Supreme Court, U.S.
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No. 06-787

In the

Supreme Court of the United States

PROTECT MARRIAGE ILLINOIS, ET AL.,
PETITIONERS,

v.

DAVID D. ORR, COOK COUNTY CLERK, ET AL.,
RESPONDENTS.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE DECISION BELOW ALLOWS ILLINOIS (AND OTHER STATES IN THE FUTURE) TO IMPOSE MORE BURDENSOME CIRCULATION PROCEDURES FOR A CONSTITUTIONALLY-GUARANTEED, CITIZEN-INITIATED REFERENDUM THAN THOSE IMPOSED UPON OTHER REFERENDA, WHERE NO GOOD REASON TO RESTRICT SUCH FIRST AMENDMENT PETITIONING EXISTS;

II. WHETHER THE SEVENTH CIRCUIT'S HOLDING ALLOWS ILLINOIS TO DENY BOTH CIRCULATORS AND VOTERS CONSTITUTIONALLY PROTECTED DUE PROCESS RIGHTS BY UNNECESSARILY BURDENING THE CIRCULATORS' EFFORTS AND STRIKING THE VOTERS SIGNATURE WITHOUT ANY NOTICE OR OPPORTUNITY OF THE VOTERS TO HAVE THEIR SIGNATURES COUNTED; and

III. WHETHER THE ILLINOIS STATUTORY SCHEME, IN NEEDLESSLY DISCRIMINATING IN ITS TREATMENT OF CITIZEN-INITIATED REFERENDA AS COMPARED TO OTHER REFERENDA, VIOLATES THE EQUAL PROTECTION CLAUSE.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Peter L. LaBarbera, David E. Smith, Robert Pajor, Sheryl Amato and Cynthia Smith, for themselves and on behalf of all others similarly situated, were parties as Plaintiffs-Appellants, and are parties here as petitioners. (A9)

Protect Marriage Illinois, Inc., is an Illinois not-for-profit corporation with no parent or publicly held company owning 10 percent or more of the corporation's stock. (A50)

Langdon Neal, Theresa Petrone and Richard Cowen, as members of the Chicago Board of Election Commissioners, Lance Gough, its executive director, Jesse Smart, chairman, Wanda L. Rednour, vice-chairman, William M. McGuffage, Bryan A. Schneider, Albert Porter, Patrick Brady, Robert Walters and John R. Keith, members of the Illinois State Board of Elections, and Daniel White, its executive director, were Defendants-Appellees, and are also parties here as respondents. (A51-52)

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OPINIONS BELOW

The opinion of the Court of Appeals (A1) is reported at 463 F.3d 604. The opinion of the district court (A9) is reported at 2006 WL 2868321 (N.D.Ill.).

JURISDICTION

The judgment of the Court of Appeals was entered on September 6, 2006. (A46) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pursuant to this Court's Rule 14.1(f), the provisions of Illinois election law involved in this case, including 10 ILCS §§ 5/1-1, 5/1-3, 5/4-6, 5/5-5, 5/6-20, 5/10-2, 5/10-3, 15/10-8, 9-8(g-5), 5/28-1, 5/28-3, 5/28-4, 5/28-9, 5/28-10, 5/28-11, 5/28-12, and 76/5, and 810 ILCS 5/3-308, are set forth at App., *infra* 37-47.

Similarly, the provisions of the United States Code involved in this case, including 28 U.S.C. §§ 1291, 1292(a)(1), 1331, 1343 and 2201, and 42 U.S.C. § 1983, are set forth at App., *infra*, 33-36.

STATEMENT OF THE CASE

This case involves a constitutional challenge to certain statutory regulations governing the Illinois advisory initiative process, as set out in the Illinois Election Code, 10 Ill. Comp. Stat. 1-1 *et. seq.* Petitioners commenced this action by filing a summons, complaint and a motion for a preliminary injunction on July 18, 2006. (A48-89). The parties agreed to an expedited briefing schedule, and ten days later the Defendants-Appellees filed a motion to dismiss. After all briefing on relevant motions was submitted to the District Court, Judge Elaine E. Bucklo issued a written decision and order on August 2, 2006, denying Plaintiffs-Appellants' motion for a preliminary injunction and granting Defendants-Appellees' motion to dismiss. A final judgment was entered the following day, disposing of all the parties'

claims. (A9-32). The Petitioners (then Plaintiffs-Appellants) timely filed an Emergency Notice of Appeal to the Seventh Circuit Court of Appeals, which expedited the appeal but denied the Motion for a Preliminary Injunction. *Id.* On September 6, 2006, the Court of Appeals issued its opinion affirming the trial court, and the Petitioners now bring this Petition for Writ of Certiorari. (A1-8).

The instant matter involves a state's decision to disallow a citizen-initiated petition for redress of grievances that was filed to appear on the November 2006 Illinois ballot as an advisory question. Although that general election has already taken place, this matter is not moot. The harms and controversies contained herein are capable of recurring yet evading review. Furthermore, Illinois law allows a matter erroneously withheld from the ballot in one election to be included on the ballot in a subsequent election. See, e.g., *McDunn v. Williams*, 156 Ill. 2d 288, 324, 620 N.E.2d 385 (Ill. 1993) (primary-winning judicial candidate erroneously withheld from the ballot in the 1990 general election allowed to appear on next general election ballot four years later.)

Petitioners are Protect Marriage Illinois ("PMI"), a not-for-profit Illinois corporation and several individual petition circulators and signers who wished to vote on the question at the last general election. (A50-51) Petitioners filed suit under 42 U.S.C. § 1983 and sought injunctive and declaratory relief. (A48). Petitioners challenged, *inter alia*, Illinois' regulatory restrictions on the manner in which petitions for citizen-initiated, non-binding referenda are considered for placement upon the ballot, including but not limited to the number of signatures required (A67), the requirement of single jurisdiction petition sheets for each of the 110 election jurisdictions (A59, 65), and a standardless state review procedure judging whether petition signatures "reasonably compare" to signatures on signers' voter registration records. (A61, 68).

Petitioners put forth uncontradicted evidence showing that the state scheme requires each petition sheet to be

dedicated to a single election jurisdiction, of which, as noted, there are 110. (A4). Any signature on a petition sheet that is dedicated to a jurisdiction other than where the signer was registered to vote would be thrown out by the state. During the signature validity ("reasonably compares") examination, state employees also throw out the signatures of signers who wrote addresses on the petition sheet other than what is listed on voter registration records. (A62). Petition signers were given no notice of these examination results, and thus no opportunity to defend their signatures. (A65). None of these restrictions apply to statewide candidate, new party or to multi-county citizen-initiated advisory petitions. (A67). A minimum signature requirement of 8% of the votes cast in the prior governor's election required petitioners to obtain some 283,000 signatures, while statewide new-party and candidate petitions required only 25,000 signatures. (A67).

This initiative petition was advocated, circulated and filed by Petitioners for the November 7, 2006 ballot. (A50). 10 ILCS 5/28-9. The question read as follows:

> "Shall the Illinois General Assembly submit an amendment to Article IX of the Illinois State Constitution to the voters of the State of Illinois at large at the next General Election stating as follows:
>
> 'To secure and preserve the benefits of marriage for our society and for future generations of children, a marriage between a man and a woman is the only legal union that shall be valid or recognized in this State'?" (A76).

While a project manager of the petition drive, David E. Smith found that complying with the requirement for single-jurisdiction petition sheets required him and numerous other petition circulators to expend at least 2,000 cumulative hours of signature-gathering time merely in searching for the correct single-jurisdiction signature sheet. (A80-84). The

circulators were each required to search through as many as 10 to 110 petition forms in order to find the correct jurisdiction sheet for a given signer. During those delays, an estimated total of 10,000 or more potential signers who were lined up to sign the petition could not wait and therefore left without signing because of the delay. (A84). Then, another 20,000 of the signers who waited through the delays and signed the petition were later stricken from the official tally by the state because they signed on the wrong petition sheet and thousands more signatures were found to not "reasonably compare" to the signatures on their voter registration records. (A53-54). This "reasonably compares" method of state review failed to take into account the many circumstances that caused otherwise-valid signatures to not "reasonably compare," such as the fact that many signers signed this petition outdoors, on a clipboard, sometimes while standing in cold weather and wearing gloves. (A84-85) In addition, other signers' increased age or newly acquired physical infirmities caused their signatures to change over time. (A47).

Diane Marsh, a qualified expert examiner of questioned documents, including analysis of signatures and handwriting, was presented with 77 petition signatures that the state had found did not "reasonably compare" to the corresponding signatures on the signers' voter registration documents. Ms. Marsh employed certain principals and theories of handwriting examination and she used 12 different characteristics while comparing the petition signatures to the signatures on the signers' voter registration cards. As the result of her expert examination, Ms. Marsh determined that 33 of the 77 stricken petition signatures submitted to her were signed by the person the signer purported to be. (A87-88).

REASONS FOR GRANTING THIS PETITION

I. THE DECISION BELOW ALLOWS ILLINOIS (AND OTHER STATES IN THE FUTURE) TO IMPOSE MORE BURDENSOME CIRCULATION PROCEDURES FOR A CONSTITUTIONALLY-GUARANTEED CITIZEN-INITIATED REFERENDUM THAN THOSE IMPOSED UPON OTHER REFERENDA, WHERE NO GOOD REASON TO RESTRICT SUCH FIRST AMENDMENT PETITIONING EXISTS.

Introduction

The Seventh Circuit's decision below, coupled with its predecessor decision, *Georges v. Carney,* 691 F.2d 297 (7th Cir. 1982), represent a counter-intuitive branch of the treatment of petitions, generally, and citizen-initiated petitions for redress of grievances, specifically. The right to petition, long a cherished first amendment right, has in recent years been secured and protected by this Court. See, e.g., *Meyer v. Grant,* 486 U.S. 414, 420 (1988) and *Buckley v. American Constitutional Law Foundation,* 525 U.S. 182, 192 (1999). However, the Seventh Circuit has carved an exception to this protection by denigrating the fact that the petition at issue here is one which was citizen-initiated—as opposed to government-initiated—and one which was nonbinding. Neither factor warrants treating the instant petition as less worthy of First Amendment protection, and neither factor justifies or condones the unreasonable burdens that Illinois imposes on such petition.

After briefly tracing the nature and history of the right to petition for redress of grievances in this country, Petitioners will discuss the protection this Court has afforded petitions. Petitioners will also argue that their petition is core political speech that must be protected in light of the fact that the state has created a forum, to wit: a place on the ballot for the question. Petitioners will then contrast the manner in

which the Seventh Circuit has treated these petitions as unworthy of that protection. Finally, Petitioners will demonstrate how Illinois' statutory scheme fails to pass muster under the appropriate standard of review.

Nature and History of the Right to Petition for Redress of Grievances

The right to petition government for redress of grievances has a long and cherished history in the United States, which warranted this right's inclusion in the First Amendment. Its roots go back at least to the Magna Carta of 1215 in England. In this country, it stems from the right to petition local assemblies in colonial times. Of necessity, it has evolved due to the greater population and greater complexity of society. For a detailed history of the right to petition, see Smith, "Shall Make no Law Abridging...": An Analysis of the Neglected, Nearly Absolute, Right of Petition, 54 U.Cin. L. Rev. 1153 (1986); Note, "A Short History of the Right to Petition Government for the Redress of Grievances," 96 Yale L.J. 142 (1986); and, Calhoun, "Initiative Petition Reforms and the First Amendment," 66 U. Col. L. Rev. 129 (1995). See also, further discussion, *infra* argument III.

It is undisputed that the right to petition the government is among those rights considered fundamental. As recently as *BE&K Construction Company v. NLRB,* 536 U.S. 516, 524-25 (2002), this Court stated:

> The First Amendment provides, in relevant part, that "Congress shall make no law ... abridging ... the right of the people ... to petition the Government for a redress of grievances." We have recognized this right to petition as one of "the most precious of the liberties safeguarded by the Bill of Rights," *Mine Workers v. Illinois Bar Assn.*, 389 U.S. 217, 222 (1967), and have explained that the right is implied by "[t]he very idea of a

> government, republican in form," *U.S. v. Cruikshank,* 92 U.S. 542, 552 (1876).

Supreme Court Protection of the Right to Petition

This Court has held that the process of obtaining signatures on petitions for citizen initiatives is core political speech. *Meyer,* 486 U.S. at 420. The Court observed that the "circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change." *Id.* at 421. The Court held that the fact that a law permitted the proponents to use other methods to obtain signatures did "not take their speech through petition circulators outside the bounds of First Amendment protection" because it "restrict[ed] access to the most effective, fundamental and perhaps economical avenue of political discourse...." *Id.* at 424. Moreover, "there is practically universal agreement that a major purpose of [the First Amendment] was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Thus, regulations on the speech involved in this case mandate the strictest constitutional scrutiny possible. Indeed, it requires exacting scrutiny "at its zenith." *Meyer*, 486 U.S. at 422.

Meyer involved a Colorado statute that made it a felony to pay petition circulators. The Court held that the prohibition:

> Restricts political expression in two ways: First, it limits the number of voices who will convey appellees' message and the hours they can speak and, therefore, limits the size of the audience they can reach. Second, it makes it *less likely that appellees will garner the number of signatures necessary to place the matter on the ballot*, thus limiting their ability to make the matter the focus of statewide discussion.

Id. at 422-23 (emphasis added; footnote omitted). The state's interest in protecting the integrity of the initiative process did "not justify the prohibition because the State has failed to demonstrate that it is necessary to burden appellees' ability to communicate their message in order to meet its concerns." *Id.* at 426.

The ability to communicate with voters and to garner signatures is at the heart of *Meyers'* holding. The *Meyer* Court acknowledged that statutes limiting the power of the people to initiate legislation are to be closely scrutinized and narrowly construed. *Id.* At 423, citing *Urevich v. Woodard*, 667 P.2d 760, 763 (1983). The *Meyer* Court further noted that, although Colorado had no obligation to afford its citizens such an initiative procedure, having decided to confer the right, the State was obligated to do so in a manner consistent with the Constitution. *Id.* at 425.

In *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), the Supreme Court reinforced its *Meyer* holding. In *Buckley,* the Court held that petition circulators could not be limited to registered voters for the same reasons that Colorado could not prohibit paying for circulators — the regulation limited communication of the proponents' message and reduced the chances of qualifying an initiative for the ballot. *Id.*

In addition to its status as a protected right under the First Amendment as a petition for redress, the subject advisory referendum is protected as expression and as assemblage under the First Amendment. Unlike candidate ballots, binding initiatives and government-initiated questions, the citizen-initiated advisory question is solely intended to communicate public sentiment to effectuate political change. Therefore, the advisory initiative ballot serves an "expressive function" which may not be interfered with lightly. *Id.*

The state has designated a forum for the specific purpose of allowing the public to express their opinions on questions of public policy. This Court has decided a line of

cases framing the parameters of the public forum doctrine. These cases recognized two basic categories of fora: (1) the traditional public forum, and (2) the designated public forum. The later is created by government policy and/or practice, see *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37 (1983), while the former is said to have existed "immemorially" and includes public parks, streets and sidewalks. *See Hague v. CIO,* 307 U.S. 496, 515 (1939).

The designated public forum can be further broken down into what has been described as a "limited public forum," wherein the government can limit the forum to certain subject matters with the exclusion of others (e.g. a forum for the exclusive discussion of civil rights). The scope of the forum will depend on the policy creating it and/or the extent to which a wide variety of subject matter has been historically permitted in the forum. *See Widmar v. Vincent,* 454 U.S. 263 (1981). Regardless of the nature of the forum (i.e. traditional, designated, limited or non-public). it is never constitutionally permissible, to discriminate based on viewpoint. *See Perry, supra; see also Lamb's Chapel v. Center Moriches School District* 508 U.S. 384 (1993).

Seventh Circuit Denigration of the Right to Petition

In the Seventh Circuit decision and in *Georges v. Carney*, 691 F.2d 297 (7th Cir. 1982), the Seventh Circuit has appeared to denigrate the right of petitioning, especially with respect to citizen-initiated, nonbinding referenda. In *Georges*, individuals belonging to a private group challenged restrictions on a county-wide, citizen initiated referenda, which the court acknowledged made it "practically impossible" to place the advisory question upon the ballot. *Id.* at 301. These restrictions included obtaining signatures of 25 percent of the registered voters of the county, a limit as to the number of referenda which could appear on the ballot and the manner in which such referenda were given priority as to placement upon the ballot. The *Georges* court essentially held that since Illinois was not required to allow the ballot to

be used as a means to communicate ideas in the first instance, it was not impermissible for the state to impose the burdens which — admittedly — made it nearly impossible to obtain a place on the ballot for their petition question. *Id.* at 300-02.

In the PMI decision, Judge Posner relied, in part, upon *Georges*. This is so even though this Court in *Meyer* repudiated a central premise of *Georges*, to wit, that because the state was not obligated to provide the advisory ballot it had near *carte blanche* ability to make the advisory referendum unobtainable. In PMI, once again focusing on the citizen-initiated, non-binding referendum as "speech," as opposed to petitioning, the Seventh Circuit held that the eight percent of votes cast in previous election, the 110 jurisdiction petition sheet requirement, and the "reasonably compares" *ad hoc* signature review, were not impermissible. *Protect Marriage Illinois v. Orr,* 463 F.3d 604, 606-08 (7th Cir. 2006). It couched its decision in terms of the State's alleged need to avoid "ballot clutter" and a "ballot as long as Rip Van Winkle's beard," and the state's interest in preventing fraud. *Id.* at 606-07. While the court seemed to concede that the state was not employing "objective" methods in its means, nonetheless it held there was no first amendment, due process or equal protection violations. *Id.* at 606-08.

Flaws in the Seventh Circuit's Analysis

The function of the advisory ballot questions is distinct. It differs from candidate ballots and law-making ballots in one very significant way—its only purpose is to communicate a message in this case to government. That message is communicative when soliciting petition signers as well as when presented to voters on the ballot and it then fulfills its purpose to communicate to government. It functions like a direct citizen petition for redress of grievances. In essence, the state has created a "super-petition" presented to all voters. Those who favor the proposition will vote yes (or sign the petition) and those who

oppose will vote no (or fail to sign the petition). In the end, the will of the voters is *communicated.*

The fact that the Constitution does not compel the creation of the advisory ballot does not mean that the state is then insulated from First Amendment scrutiny. This is the touchstone of Judge Posner's analysis in both *Georges* and the underlying PMI case, and it is contrary to this Court's dictates in *Meyer*. Once the state opens a forum for expressive activity it must comport with the appropriate constitutional safeguards. Moreover, nothing justifies less sacrosanct treatment of citizen-initiated — as opposed to government-initiated — referenda. Citizen-initiated petitioning is arguably the more cherished form of referenda, given the history of petitions. Further, no valid distinction between binding and nonbinding referenda exists for the purposes of determining what protections referenda should be allowed. While binding referenda dictate action, non-binding referenda stimulate ideas and discussion. If they fail to prompt action, citizens will make their feelings known in candidate elections.

The Seventh Circuit's repeated references in PMI to the hobgoblin of ballot clutter are nothing but phantom concerns. It is uncontradicted that Illinois allows only three such referenda in any election (see 10 ILCS 5/28-1). The evidence does not show any more than one such referendum for the November, 2006, ballot and the public record reveals there has been but one such referendum in 28 years. See *In re Armentrout*, 99 Ill. 2d 242, 457 N.E.2d 1262 (Ill. 1983).

The state's requirement that circulators maintain a separate petition sheet for each of the 110 election jurisdictions "makes it less likely that the [Petitioners] will garner the number of signatures necessary to place the matter on the ballot." *Meyers*, 486 U.S. at 422. In direct contravention of the principles set forth in *Meyer*, however, the Seventh Circuit found that requiring 110 separate petitions did not inhibit proponents of the advisory question from communicating with signers. The Court of Appeals

concluded, contrary to the record, that there were "few" venues where multiple sheets would be needed, and opined that "blank sheets could be used and collated back at headquarters," ignoring the fact that sheets with more than one jurisdiction are impossible to "collate" for a single jurisdiction. *PMI,* 463 F.3d at 607.

While the Seventh Circuit belittled and misrepresented the difficulty of obtaining signatures in light of the 110 jurisdiction sheet requirements, the court's comments are not a substitute for evidence, and Petitioners evidence was uncontradicted and the facts in their complaint are taken as true since they are brought to this court following the granting of a motion to dismiss the complaint. *Thompson v. Illinois Dept. of Prof'l Regulation*, 300 F.3d 750, 753 (7th Cir., 2002).

The record shows that the separate petition sheet for each jurisdiction places a heavy burden on petition circulators. If the State's concern is with the administrative convenience of getting petition signatures to the relevant election jurisdiction to determine their validity, it can accomplish that goal without impermissibly burdening speech. The State could require initiative proponents to submit a copy of the petition to each jurisdiction when petition sheets contain signatures from multiple jurisdictions. The State could require that proponents identify which signatures on the sheet are from that jurisdiction. This procedure would place no administrative burden on the State. Petition circulators could then make full use of their one-on-one contacts to convey their message to signers without the hindrance of searching for the proper jurisdiction sheet.

It is respectfully submitted that the PMI opinion reaches far and wide in an effort to justify its holding. The court, in discussing the 5 percent sample validity requirement, observed—again without any authority—that "[I]f sampling reveals a high incidence of fraud, the chances are that even more of the petitions have fraudulent signatures than the ones that were detected, but that those frauds

escaped detection because the signatures on those petitions were forged more deftly." *PMI,* 463 F.3d at 607. The court added that any genuine signatures falsely identified as fraudulent could be challenged by the petition proponent. *Id.* Aside the fact that the signature comparison process (uniquely applied to this type of referendum) is constitutionally impermissible for its utter lack of standards, the court below reveals a lack of understanding of the petition signing process. Why a greater percentage of fraudulent signatures would likely exist is unclear, given the genuine reasons a signature may not seem to compare (age, infirmity, injury or illness, to name a few), it is as likely that more genuine signatures, rather than less, would be found. It is also impracticable for the proponent, a volunteer organization, to go out and locate the many thousands of individuals and documents needed to rehabilitate the signatures the state's non-expert and unguided personnel have maligned.

The court below concluded that a numerical signature requirement of 8 percent of the votes cast in the governor's election (here almost 300,000) was not unreasonable. This is so despite the fact the number of signatures required for petitions for statewide candidates, multi-county election districts does not exceed 25,000. However, even if such a high number could stand alone, it cannot stand in light of the unconstitutional restrictions the state imposes. The explanation would appear to be that the Seventh Circuit will affirm any restriction, since in *Georges* it has already indicated that restrictions effectively making it impossible to place a question upon the ballot are constitutionally copasetic.

It is clear that the state in this case has created a forum for political expression on the ballot. The residents of Illinois have been given the opportunity to petition their government officials through the initiative process. This Court in *Perry* stated that "the Constitution forbids a state to enforce certain exclusions from a forum generally open to the

public even if it was not required to create the forum in the first place." *Perry,* 460 U.S. at 45.

In a ballot public forum such as for the advisory ballot question presented in this case[1], the state may impose reasonable time, place and manner regulations so long as they are "content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry,* 460 U.S. at 45. The state cannot meet this burden. The Seventh Circuit did not discuss below that Illinois' treatment of nonbinding referenda constitutes content-based restrictions on speech by treating initiative petitions differently than candidate and other petitions. Content-based restrictions are subject to "the most exacting scrutiny." *Turner Broad. Sys., Inc. v. F.C.C.,* 512 U.S. 622, 642 (1994).

Illinois imposes a "differential burden" on initiative petitions that it does not impose on statewide petitions for new political parties or candidates. Those petitions are not limited to single-jurisdictions. 10 ILCS 5/7-10, 10-2, 10-4. Signatures on petitions relating to public questions for districts with more than one county but less than statewide are also not limited to sheets with signatures from the same election jurisdiction. 10 ILCS 5/28-3, 28-5, 28-6, 28-7. What is more, no other petition in the state grants election officials unbridled discretion to determine if a signature "reasonably compares" to the voter's registration card. 10 ILCS 5/28-11(2). Whether a particular petition must be subject to the burdens of the Illinois regulation cannot be determined "without reference to [the] content of the communication." If it is a candidate, new party, or a multi-county petition, it is not subject to these restrictions. But, a petition for a citizen-

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[1]A forum need not consist of a physical structure. *Rosenburger,* 460 U.S. at 830 (forum at issue was a publication, "a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable.")

initiated statewide advisory question is subject to these additional restrictions. Thus, initiative petitions are placed at a disadvantage solely because of the content of their speech. As Justice Thomas noted in his *Buckley* concurrence, a regulation burdening initiative petitions that does not burden candidate petitions is a content-based restriction. *Buckley,* 525 U.S. at 209.

The inequitable treatment of the advisory question petition renders the state's purported interests highly suspect. Only the advisory question is burdened with the requirement that election officials scrutinize petition signatures to determine if they "reasonably compare" with registration cards. Instead of giving these signatures the same presumption of validity as candidate and political party petitions, the state subjects them to arbitrary and standardless scrutiny. This is also at odds with the customary presumption of validity for signatures. *See, e.g., First Nat'l Bank v. Bernius*, 127 Ill. App. 3d 193, 198-99 (Ill. Ct. App. 1984) (recognizing that under the Uniform Commercial Code, signatures are presumed to be valid). The state cannot demonstrate a compelling interest in applying these special restrictions to advisory questions.

Petitions for statewide candidates are not required to maintain a separate petition for each of 110 election jurisdictions. If the state's rationale is compelling (or even rational) it would be applied to all ballot petitions. The fact that this requirement is not applied to all petitions undermines the state's position.

Also, the excessive signature requirement for an advisory petition fails to serve any compelling state interest. The lower courts justified the disparately high number of signatures for an advisory petition to avoid having the ballot clogged with a large number of advisory questions. *PMI,* 463 F.3d at 607-608. The lower courts did not explain, however, why this interest was greater than the state's interest in preventing clogging of the ballot with candidates, political parties or advisory questions in smaller than statewide areas.

The state has presented no evidence that election officials have been inundated with advisory question petitions such that there is danger of ballot clogging. As shown two paragraphs below, there has been only one such petition in the last 28 years.

The excuse of danger of fraud In Illinois in connection with advisory questions rings hollow as it is remote. The state's interest cannot be compelling. The advisory question has no force of law, the state cannot justify extraordinary measures to prevent potential fraud which its does not apply to other petitions which have an established history of fraud and have real legal implications. Courts have routinely struck down regulations which seek to prevent speculative harm. *Home Box Office, Inc v. FCC,* 567 F.2d 9, 36 (D.C. Cir. 1977). It is well-settled that "[m]ere speculation of harm does not constitute a compelling state interest." *Consolidated Edison Co. of New York, Inc. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 543 (1980).

The only published opinion in Illinois relating to fraud with respect to statewide, citizen-initiated petitions is *In re Armentrout*, 99 Ill. 2d 242, 457 N.E.2d 1262 (1983), which concerned isolated conduct in 1978 — some 28 years ago. Illinois has not seen fit to impose any similar anti-fraud regulations on the petition at issue, despite the fact that fraud is greatly prevalent in candidate and new party petitions. (See fraud cases cited *infra* argument III).

Even if this Court were to hold the regulations at issue as content-neutral, the signature verification process must still be struck down for lacking constitutionally sufficient procedural safeguards. This court has already "required that a time, place, and manner regulation contain adequate standards to guide the official's decision and render it subject to effective judicial review." *Thomas v. Chicago Park District*, 534 U.S. 316, 323 (2002) (internal citations omitted).

When election officials are vested with the unbridled discretion present in this case, First Amendment rights are

jeopardized. After all, the state employees may have political or religious-based emotions that influence the manner in which they exercise this discretion. 'Beauty is in the eye of the beholder,' so what looks reasonable to one may not look reasonable to another.

In this case, election officials have short-circuited Petitioners' petition through the signature invalidation process, which is a prior restraint on speech that comes to this Court with a heavy burden. *See, Niemotko v. State of Md.*, 340 U.S. 268, 271 (1951) (licensing schemes "constituted a prior restraint on freedom of speech, press and religion and in the absence of narrowly drawn, reasonable and definite standards for the officials to follow, must be invalid.").

In *Meyer*, the Court rejected any notion that regulatory burdens on the petition process were permissible because those involved could communicate their message elsewhere. The Court stated that the availability of "more burdensome" avenues of communication "does not relieve [the regulations'] burden on First Amendment expression. The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." 486 U.S. at 424. (internal citations omitted),

Without any good reason to restrict Petitioners' fundamental, First Amendment rights, the Illinois regulation should be struck down. Accordingly, this Court must issue a writ of certiorari to the Seventh Circuit and review, reverse and remand the decision herein, which was after all, dismissed at the pleading stage.

II. THE SEVENTH CIRCUIT'S HOLDING ALLOWS ILLINOIS TO DENY BOTH CIRCULATORS AND VOTERS CONSTITUTIONALLY PROTECTED DUE PROCESS RIGHTS BY UNNECESSARILY BURDENING THE CIRCULATORS' EFFORTS AND STRIKING THE VOTERS SIGNATURE WITHOUT ANY NOTICE OR OPPORTUNITY OF THE VOTERS TO HAVE THEIR SIGNATURES COUNTED.

The Fourteenth Amendment to the United States Constitution prohibits the government from depriving an individual of "life, liberty or property" without due process of law. *See Goldberg v. Kelly*, 397 U.S. 254, 263 (1970). While due process does not necessarily prohibit the state from depriving an individual of one of these rights, it does require the government to implement procedures to protect individuals from erroneous and arbitrary deprivations. *See Carey v. Piphus,* 435 U.S. 247, 259 (1978).

Though the right to due process is "absolute," it is also "flexible and calls for such procedural safeguards as the situation demands." *Gilbert v. Homar,* 520 U.S. 924, 930 (1997) (quoting *Morrissey*, 408 U.S. at 481). In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Supreme Court established an analytical framework to apply this flexible due process requirement in each situation, holding that identification of the specific dictates of due process generally requires consideration of three distinct factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the

> additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335.

The nature of the fundamental liberty interest at stake

"[T]he right to vote and the right to associate for political purposes remain two of the more fundamental rights present under our Constitution," both of which "rank among our most precious freedoms." *Libertarian Party of Illinois v. Rednour*, 108 F.3d 768, 773 (7th Cir. 1997).

Fundamental liberty interests or entitlements upon which the very well-being of an individual is dependent, like the right to vote, warrant a strict adherence to due process procedures. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951), (Frankfurter, J., concurring). "Because voting is a fundamental right, the right to vote is a 'liberty' interest that may not be confiscated without due process." *Raetzel v. Parks/Bellemont Absentee Election Bd.*, 762 F.Supp. 1354, 1354 (D. Ariz. 1990). Signatures such as those used for petitions have been treated the same as actual votes for constitutional purposes. *See, e.g., Green v. City of Tucson*, 340 F.3d 891, 897 (9th Cir. 2003). Signatures, like votes, are "an expression of a registered voter's will." *Id.* Fundamental concepts of due process mandate that once a signature is deemed to be invalid, the affected person should be notified and afforded an opportunity to be heard on the matter. Moreover, decision-making officials should have objective guidelines by which to review applicable signatures. Finally, petition signers should be allowed to undertake their own defense.

The Regulation's Failure to Provide Timely Notice and a Right to be Heard Will Lead to Erroneous and/or Arbitrary Exclusions.

Notice and an opportunity to be heard are elementary mechanisms designed to address government abuse and to reverse erroneous and arbitrary government action. "For more than a century the central meaning of procedural due

process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972)

In this case, the state has unilaterally rejected Petitioners' signatures without providing notice to those signers. Moreover, many signatures are specifically shown to have been erroneously held invalid. Several Petitioner petition signers were given no notice to defend the validity of their signatures and they desired to undertake their own defense.

The fundamental nature of the rights at issue in this case requires that signers receive notice and opportunity to defend *before* the petition is finalized. Any vindication after this point would fail to properly redress those affected. The petition process requires, at least, that every eligible person have notice when his or her signature has been invalidated so that he or she has an opportunity to redress their injury while their signatures still mean something. *Zessar v. Helander,* 2006 WL 642464 (N.D. Ill. March 13, 2006).

The United Stated District Court for the Northern District of Illinois determined in *Zessar* that it was a violation of due process to reject an absentee voter's ballot without giving the voter an opportunity to be heard before the election results were final. In *Zessar*, an absentee voter's ballot was rejected because the election board determined the signature on the ballot did not match the voter's signature on his voter registration card. *Id.*, 2006 WL 642646 at *1. The signature disqualification was in error, but the voter was not notified of the rejection of his ballot until after the election. *Id.* The *Zessar* Court held that due process required the state to give "notice and a hearing, *before* rejecting an absentee ballot." *Id.* at *5. (Emphasis added). The court noted a remedy for its defective procedure would be to mail, within days of the rejected ballot, an affidavit form by which the voter could correct the error. Because of the two week provisional post-election ballot counting period, there was

ample time for a hearing on the validity of the signature. 10 ILCS 5/18A-15. For the PMI petition, there would have been at least 12 weeks before ballot certification during which hearings could be held. 10 ILCS 5/28-5 and 28-11. Similarly, officials in this case could simply mail to each voter whose signature is questioned in a petition sample a form by which the voter could submit signature samples verifying the validity of his or her signature.

The Regulation's Failure to Include Standards for Examining Signatures Lead to Erroneous and/or Arbitrary Exclusions.

Clear and objective standards are also inherent requirements for due process. In this case, 10 ILCS 5/28-12 vests unbridled discretion in government officials when deciding whether a signature on a petition "reasonably compares" to (or "looks" the same as) the signature on a voter registration card. The lack of objective standards leaves each individual decision maker to his or her subjective will. Moreover, there is no requirement that these individuals have any training or expertise in handwriting analysis.

Procedural safeguards are the foundation of due process. The lack of adequate procedures creates impermissible risk that government officials will interfere with a fundamental liberty interest. There is a long line of cases which clearly illustrate the dangers associated with unbridled government discretion. Most of those cases arise in the free speech context when the exercise of that speech requires prior government approval. The Supreme Court has said: "[t]he settled rule is that a system of prior restraint avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." *Southeastern Promotions,*, 420 U.S. at 559.

Similarly, officials in this case have interfered with Petitioners' rights to petition the government. As noted, this Court has recognized the petition process as core political

speech deserving of the utmost protection. See *supra Buckley*. The lack of specific standards in this context makes erroneous and arbitrary signature exclusions inevitable.

It would be a small burden for the state to allow for due process.

Giving notice and an opportunity to correct its errors would not be a heavy burden on the state. 463 F.3d at 608. On the contrary, a simple verification card or a notice of signature invalidation could be sent to the affected party's address, stating the reason for the invalidation[1] and giving a return form to allow for the signature exemplars. The petition signer would then have an opportunity to defend. The same could be done for a signer found not to be registered at the address given by sending notice to the address shown. The number of signers to whom this "paper hearing" would apply would be minimal compared to the entire petition, in that only those signatures invalidated in the sample and whose signatures were erroneously removed might be motivated to correct the error. The sample is, of course, a relatively small percentage (less than 10 percent) of the total number of signatures on the petition. 10 ILCS 5/28-11. At that percentage, no more than about 35,000 signatures would be sampled. But, the expert handwriting analyst found roughly a 44 percent error rate, or about 15,000 signers who were wrongfully dropped from the signature count.(A86-89).

The state could also simply place notice in pre-determined newspapers listing invalidated signatures and allowing those voters an opportunity to provide information on a form contained in the newspaper notice to correct any

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[1] This assumes, of course, that the state even has an interest in requiring that a petition signer's signature "reasonably compares" with his voter registration card signature. Not only is this requirement absent from all other types of petitions in Illinois, it also is counter to the general presumption that a signature is valid, as noted, *infra*, Section III.A.iv.

error. Again, the number of people to which these methods would apply is relatively small where, as here, only a sample is involved. The state's burden would be light.

The state could also implement objective standards to guide officials during signature verification. Rather than using the vague "reasonably compare" standard, the statute could articulate the specific criterion experts use to compare handwriting. After all, it is not whether the signature looks the same that should control, but whether the signer is, in fact, the same person as the person registered. See, in contrast, the standard used by the state for determining a petition signature's validity for state, new party and multi-county district petitions. (*Infra* argument III).

For all the foregoing reasons, this Court must issue a writ of certiorari to the Seventh Circuit Court of Appeals and review and reverse and remand the decision herein, which was after all, dismissed at the pleading stage.

III. THE ILLINOIS STATUTORY SCHEME, IN NEEDLESSLY DISCRIMINATING IN ITS TREATMENT OF CITIZEN-INITIATED REFERENDA AS COMPARED TO OTHER REFERENDA VIOLATES THE EQUAL PROTECTION CLAUSE.

The lower courts erred in finding that Illinois' disparate treatment of the petition did not violate Petitioners right to equal protection. Illinois placed an onus on Petitioners initiative petition—an onus that it does not place on petitions for statewide candidates, new party or district initiative petitions. As shown, this onus has been applied with reference to the content of the communication and is then content based and subject to "the most exacting scrutiny." *Arizona Right to Life PAC v. Bayless*, 320 F.3d 1002, 1009 (9th Cir., 2003).

The onus arises from Illinois' crippling restrictive regulations, including the requirements for (1) a number of signatures equaling 8% of the votes cast in the prior

governor's election; (2) single-jurisdiction petition forms and the "conformity examination"; and (3) the state's unscientific and overbroad signature "validity examination." These regulations placed a heavy burden on Petitioners' circulators in terms of their ability to communicate their political message, to garner signatures from voters, and with regard to the validity of the petition due to Illinois' striking of otherwise-valid signatures. Petitioners' circulators were required to carry many different petition sheets (*e.g.*, 110 jurisdiction sheets at the Illinois State Fair) in order to comply. The delays in locating the correct sheet for each signer caused the loss of thousands of signatures because the signers could not wait. Approximately 10,000 signatures were thrown out because signers used the wrong sheet.

In contrast, other candidate, new party and multi-county circulators, need only one clipboard and one petition sheet. They do not have the single-signature petition sheet requirement, are not subject to the "conformity examination," nor are they subjected to the state "validity examination." Signatures on these other petitions are disqualified if a signature is not signed in the voter's "own proper person" (10 ILCS 5/10-4), *i.e.*, signed personally by the voter, and an objector must provide evidence proving it was not personally signed by the voter. See *e.g.*, *People v. Old Portage Park District*, 356 Ill.340, 190 N.E. 665 (1934).

The Regulations Require Strict Scrutiny.

Like the circulators in *Buckley,* the PMI circulators are similarly burdened in their communications with voters. *Buckley,* 525 U.S. at 182. The *Buckley* circulators were reduced in *number* due to the burdens they endured, which reduced the number of signatures garnered. Petitioners' circulators were reduced in *productivity* due to delays that also reduced the number of signatures garnered. This gives rise to the same result: one-on-one communication of a political message to the voter is repressed. As shown by affidavit testimony of David Smith, signers were solicited at

times when they were part of a crowd involved in other activities. While soliciting signatures at various events, the circulators' entreaty to the signers was an interruption of their participation in the events, when the signers were en route to something like a sporting event with a deadline for arrival. It is axiomatic that holding a signer's attention until he signs the petition is critical. As the *Buckley* court held, petition circulation is a "fleeting encounter" in which petition circulators must persuade electors to sign. *Buckley,* 525 U.S. at 199. The delays caused the loss of the signers' attention.

The requirement for single-jurisdiction petition forms impacts "core political speech," for which First Amendment protection is "at its zenith." *Meyer*, 486 U.S. at 425. In this case, the single-jurisdiction petition requirement caused a speech diminution of the very kind found in *Meyer* in the sense that the reduction in the number of circulators reduced the number of signatures the circulators could garner; so too were the number of signatures garnered for Petitioners reduced because their circulators were delayed searching for the correct petition sheet for every potential signer.

The lower courts also erred in finding that the lack of a standard to guide the state in determining whether the signature "reasonably compares" did not also violate Petitioners' right to equal protection. In *Bush v. Gore*, 531 U.S. 98, 103 (2000), this Court held that standardless manual ballot counting procedures violated equal protection because each county made its own determination as to what constituted a valid ballot. "The problem inheres in the absence of specific standards to ensure its equal application." *Id.* at 106 (Citing *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)).

Petitioners have shown by expert evidence that there are many reasons why a signature might not "reasonably compare" even when the signature is, nevertheless, valid. Signatures on voter registration cards can only reflect the signature as of the day of signing, which is routinely done at a counter, table or desk. The petition may be signed years

later and is often signed on a clipboard while standing and when the voter is engaged in another activity. Petitioenrs' expert has shown that the mere passage of time changes a person's signature and that signatures may change due to a stroke or other malady or simply by infirmity resulting from advanced age. The weather conditions in which a voter signs — like when a voter signs while wearing gloves in cold weather — will also affect whether the signature reasonably compares.

There is, however, no way for the state employee examining the signature to determine whether the signature is actually made by the registered voter because the employee can only speculate as to whether it "looks" the same, *i.e.*, "reasonably compares." Without any more direction than whether the signature looks the same, it is axiomatic that employees across the state will have different concepts as to whether a signature does or does not look the same. A petition signer's voice should not be muted by such a standardless system. Indeed, the state employee's own personal feelings as to the substance of the petition question may color their opinion as to the validity of signatures with this absence of standards.

The lower courts failed to find that the numerous signatures required for the initiative petition, as opposed to the lower requirement for independent candidate and new-party petitions, violates equal protection. Petitioners' petition required eleven times the number of signatures than is required for statewide independent candidate and new-party petitions. 10 ILCS 5/10-3, 5/10-2. Illinois' minimum signature requirements were at issue in *Illinois State Board of Elections v. Socialist Worker's Party*, 440 U.S. 173, 186-87 1979), in which this Court held that the Illinois signature requirements distinguished state candidates, political parties, and the voters supporting each, from city candidates, parties and voters. In the *Socialist Worker's Party* case, the minimum petition signature requirement for the Socialists' new-party petition in Chicago was only 10,000 *more* than the

25,000 signatures required for a statewide new-party petition. The fundamental rights to associate and to vote were burdened by this requirement and the court found that the higher Chicago requirement did not serve a compelling state interest, nor was it the least restrictive means. *Id.* at 186.

Petitioners are in a position similar to that of the Socialist Worker's Party. There is a disparity between the minimum signature requirement for the statewide initiative petition and what is required for statewide candidate and new-party petitions. Petitioners' initiative petition, like the Socialist Worker's new-party petition, implicates fundamental rights. Illinois has shown no evidence of, or argument for, a compelling interest for creating this disparity.

As to preventing a claimed an overcrowded ballot, however, Illinois now limits access to only three statewide petition questions per ballot. 10 ILCS 5/28-1). Furthermore, no evidence shows that any advisory question other than Petitioners' question would have appeared on the subject ballot. As to ensuring public support by having a greater number of signatures, Illinois has not shown evidence or argument demonstrating why more public support is needed for Petitioners' cause than for candidate and new-party petitions. With regard to fraud, Illinois cites a single 28-year-old incident of isolated vote fraud as its basis for this claim. Yet the many incidents of petition fraud in candidate and new-party petitions have not caused Illinois to increase the signature requirements for these petitions. See *e.g.,* Illinois candidate and new party fraud cases: *Carter v. Cook County Officers Electoral Board*, 170 Ill.App.3d 364, 523 N.E.2d 1299 (1988). (pattern of fraud, false swearing, disregard of Election Code); *Huskey v. Municipal Officers Electoral Board*, 156 Ill.App.3d 201, 501 N.E.2d 555 (1987) (pattern of fraud, false swearing, disregard of Election Code); *Fortes v. Dixon*, 122 Ill.App.3d 697, 462 N.E.2d 615 (1984) (pattern of fraud, false swearing and total disregard of the Election Code); *Bowe v. Chicago Electoral Board,* 79 Ill.2d 469, 404 N.E.2d 180 (1980) (false notarization); and *Williams v.*

Butler, 35 Ill.App.3d 532, 341 N.E.2d 394 (1976) (false notarization).

Illinois has no compelling reason to justify the severe burden on Petitioners caused by the onerous signature requirements.

CONCLUSION

Petitioners respectfully request that this Honorable Court grant their petition for a writ of certiorari.

Respectfully submitted,

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December 5, 2006

APPENDIX

463 F.3d 604

OPINION AND FINAL JUDGMENT

United States Court of Appeals, Seventh Circuit.

PROTECT MARRIAGE ILLINOIS, et al., on behalf of themselves and all others similarly situated, Plaintiffs-Appellants,

v.

David D. ORR, et al., Defendants-Appellees.

No. 06-3111.

Submitted Aug. 23, 2006.
Decided Sept. 6, 2006.

Glen E. Lavy, Alliance Defense Fund Law Center, Scottsdale, AZ, Michael E. Lavelle, Lavelle & Motta, Chicago, IL, for Plaintiffs-Appellants. Elizabeth E. Howlett, Office of the Cook County State's Attorney, James M. Scanlon, Scanlon & Associates, Thomas A. Ioppolo, Office of the Attorney General, Chicago, IL, for Defendants-Appellees.

Before POSNER, KANNE, and MANION, Circuit Judges.
POSNER, Circuit Judge.

Illinois law permits "advisory questions" to be placed on the ballot in general elections. Ill. Election Code, art. 28, 10 ILCS 5/28-1 to -13. The advice has no legal force. ILCS 5/28-6(c); *Georges v. Carney*, 691 F.2d 297, 299 (7th Cir.1982). The plaintiffs want to place on the ballot for the forthcoming elections in November the question whether the Illinois General Assembly should propose to amend the state constitution to provide that in order "to secure and preserve the benefits of marriage for our society and for future generations of children, a marriage between a man

and a woman is the only legal union that shall be valid or recognized in this State."

To get an advisory question placed on the ballot, petitions must be signed by registered voters equal in number to at least 8 percent of the votes cast at the last gubernatorial election, and must be submitted to the Board of Elections at least six months before the election. 10 ILCS 5/28-9. This rule required the plaintiffs to collect approximately 283,000 petitions by the deadline. They collected more than 347,000. But state law further requires the Board to compare the signature on a petition with the petitioner's signature on his voter registration card and determine whether the signatures "reasonably compare," and also to compare the address on the petition with the address on the card to determine whether they match. If a sample of comparisons reveals that more than 5 percent of the petitions are invalid, the question is not placed on the ballot. 10 ILCS 5/28-11 to -12. That is what happened here, precipitating this suit which charges that the requirements for getting an advisory question on the Illinois ballot are so onerous that they violate freedom of speech (or of association, or to petition for redress of grievances), equal protection, and due process of law. The district court disagreed and dismissed the suit on the pleadings.

A state no more has a federal constitutional obligation to permit advisory questions on its ballot than it has to permit them to be painted on the walls of the state capitol. *Georges v. Carney, supra*, 691 F.3d at 301-02. Except in states that authorize referenda, initiatives, or other modes of direct democracy, the purpose of a ballot is to list candidates for public office rather than to list policy positions or survey public opinion. *Timmons v. Twin Cities Area New*

Party, 520 U.S. 351, 363, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997). The ballot is not a traditional public forum for the expression of ideas and opinions, like streets or parks, to which reasonable access must be given to people who want to engage in political and other protected expression. The fact that a public facility *could* be used for political speech doesn't require that it be made available for such use. A publicly owned theater doesn't have to be thrown open for political rallies. See *Hotel Employees & Restaurant Employees Union v. City of New York Department of Parks & Recreation*, 311 F.3d 534, 550-54 (2d Cir.2002). A state can operate schools without having to throw the classrooms open for such rallies either, *Perry Education Ass'n v. Perry Local Educators' Assn.*, 460 U.S. 37, 47, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). Likewise a state can hold elections without having to permit political or commercial advertising to be affixed to the ballot. Cf. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974). Illinois is the only state that permits ballots to include advisory questions submitted by citizens (as distinct from officials) and no one supposes (unless perhaps it is these plaintiffs) that the other 49 states are violating the Constitution.

If a state can thus ban advisory questions from the ballot altogether, it can impose requirements designed to avoid ballot clutter, provided the requirements are not jiggered in a way that discriminates against particular advocates or viewpoints. There is no suggestion of that here. Nor is any objective method suggested for trading off the benefits of advisory questions as modes of expression against the costs in making ballots unwieldy and distracting voters from their main function, which is to vote for candidates.

Even if as we do not believe Illinois is required by the First Amendment to impose only limitations that we would deem reasonable on access to the ballot for political speech, we are given no grounds for thinking that 8 percent of the votes cast in a previous election is an unreasonably high percentage given the state's undoubted interest in sparing the voter a ballot as long as Rip Van Winkle's beard. The "butterfly ballot" that caused such chaos in the 2000 Presidential election in Palm Beach County, Florida, shows how hard it is to make an overlong ballot intelligible to the voter.

The plaintiffs also complain about the further requirement that all petitions of individuals in the same election district be combined and attached to a separate sheet, to facilitate checking the signatures against the voter registration cards, which are kept in the election board of each district. The convenience served by the requirement is obvious but the plaintiffs complain that it might require each of their canvassers to carry 110 sheets to each location (church, stadium, etc.) in which the canvasser seeks petitioners, because there are 110 election districts in the state. But there are few locations in which people from all 110 districts, or indeed from more than a small fraction of that number, congregate. Anyway, while the canvasser could carry with him on his forays blank sheets of paper he wouldn't need 110 of them on which to write the number of the district when he encounters someone from a different part of the state. He need only note the petitioner's address (which, remember, must appear on the petition) and then, back at canvassing headquarters, sort the petitions by district and attach all the petitions from the same district to a sheet.

The 5 percent validity requirement is also reasonable. If sampling reveals a high incidence of fraud, the chances are that even more of the petitions have fraudulent signatures than the ones that were detected, but that those frauds escaped detection because the signatures on those petitions were forged more deftly. Of course, false positives – signatures mistakenly deemed fraudulent by the election office's staff – are possible as well. But they presumably would be challenged by the proponent of the advisory question, in this case Protect Marriage Illinois, as the proponent is authorized to do (as we are about to see).

The plaintiffs point us to *Meyer v. Grant*, 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988), where the Supreme Court held that Colorado, which authorizes the initiative (that is, a ballot proposal that if supported by a majority of the voters becomes a law, bypassing the legislature), could not constitutionally forbid proponents to pay the canvassers. The Court made clear, however, that the state was free not only to impose a percentage requirement for ballot eligibility but also to adopt strict measures for preventing the forging of signatures. It was in light of these controls that the Court concluded that the criminalization of paid canvassers was an undue further burden on the initiative process. *Id.* at 425-28, 108 S.Ct. 1886. Another superfluous restriction on Colorado's initiative process – requiring that the canvassers be registered voters – was struck down on similar grounds in *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999).

People who go about asking voters to sign petitions in support of proposed laws are engaged in political speech, as in the *Meyer* and *Buckley* cases, and a state cannot tax speakers without a compelling reason. Illinois places no

limitations on petitions asking legislators to oppose homosexual marriage. Ballot access is another matter. It must be tightly regulated for the protection of the democratic process. This is true even when the regulation concerns the listing of candidates. A state is not required to list everyone who wants to stand for office, for then ballots would be the size of telephone books. It can impose reasonable restrictions on access, as by requiring, just as in this case, that the would-be candidate demonstrate significant support for his candidacy by submitting thousands (or, depending on the size of the electorate, tens or even hundreds of thousands) of petitions in order to prevent the voter confusion that would be engendered by too long a ballot. *Munro v. Socialist Workers Party*, 479 U.S. 189, 193, 107 S.Ct. 533, 93 L.Ed.2d 499 (1986); *American Party of Texas v. White*, 415 U.S. 767, 782, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974); *Storer v. Brown*, 415 U.S. 724, 732, 94 S.Ct. 1274, 39 L.Ed.2d 714, (1974): *Jenness v. Fortson*, 403 U.S. 431, 442, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971); *Libertarian Party of Illinois v. Rednour*, 108 F.3d 768, 774 (7th Cir.1997). Equally can states that permit initiatives or referenda place reasonable restrictions (as the Court acknowledged in *Meyer*) on the use of these methods of putting public issues before the electorate. *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 297 (6th Cir.1993).

The plaintiffs further argue that Illinois has denied them the equal protection of the laws by allowing a candidate to be listed on the ballot if he has petitions signed "by 1% of the number of voters who voted in the next preceding Statewide general election or 25,000 qualified voters of the State, whichever is less," 10 ILCS 5/10-3-a much lower percentage than required to get an advisory question on

the ballot (though percentages higher than 1 percent are required for some offices). But the difference is warranted by the fact that the primary purpose of the ballot is to list candidates rather than questions, each of which takes up more space on the ballot than the name, party affiliation, and office sought of a candidate.

To demonstrate, finally, a denial of due process, the plaintiffs point out that there is no procedure by which an individual petitioner whose petition was struck because the signature was invalid can challenge the strike. But what is required in the name of due process depends, as the Supreme Court made clear in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), on the costs as well as the benefits of process. See also *Wilkinson v. Austin*, 545 U.S. 209, 125 S.Ct. 2384, 2395, 162 L.Ed.2d 174 (2005); *Holly v. Woolfolk*, 415 F.3d 678, 680-81 (7th Cir.2005) (and cases cited there). The cost of allowing tens of thousands of people to demand a hearing on the validity of their signatures would be disproportionate to the benefits, which would be slight because the state allows the organization orchestrating a campaign to put an advisory question on the ballot, in this case Protect Marriage Illinois, to challenge the disqualification of any petitions. Nor is it clear to us what right of liberty or property (an essential predicate of a due process claim) the plaintiffs have been deprived of by being required to comply with the requirements of state law. *Dobrovolny v. Moore*, 126 F.3d 1111, 1113 (8th Cir.1997); *Biddulph v. Mortham*, 89 F.3d 1491, 1500 (11th Cir.1996) (per curiam).

No other issue has sufficient merit to warrant discussion. The judgment dismissing the suit is

Affirmed.

2006 WL 2868321

MEMORANDUM OPINION AND ORDER

United States District Court,
N.D. Illinois, Eastern Division.
PROTECT MARRIAGE ILLINOIS, et al., Plaintiffs,
v.
David D. ORR, et al.
Defendants.
No. 06 C 3835

Aug. 2, 2006.

Michael Edward Lavelle, Lavelle and Motta, Chicago IL, Benjamin W. Bull, Brian W. Raum, Dale M. Schowengerdt, Glen E. Lavy, Alliance Defense Fund, Scottsdale, AZ, for Plaintiffs.

Elizabeth Erin Howlett, Cook County State's Attorney, James Michael Scanlon, Joan T. Agnew, James M. Scanlon & Associates, Thomas A. Ioppolo, Kathleen Louise Ford, Illinois Attorney General's Office, Chicago, IL, for Defendants.

Jeffrey D. Colman, Erin Maureen O'Connell, John R. Storino, Jenner & Block LLP, James P. Madigan, Lambda Legal Defense & Education Fund, Chicago, IL, for Intervenor Defendant.

MEMORANDUM OPINION AND ORDER

ELAINE E. BUCKLO, District Judge.

Plaintiffs Protect Marriage Illinois ("PMI") and individual plaintiffs Peter LaBarbera, David Smith, Robert Pajor, Sheryl Amato and Cynthia Smith have brought the instant case challenging (1) provisions of the Illinois Election Code, 10 Ill. Comp. Stat. 1-1 *et seq.*, that

allow the placement on the ballot of advisory questions of public policy, 10 Ill. Comp. Stat. 5/28-1 *et seq*, and (2) particular conduct by defendants in implementing these provisions. PMI and the individual plaintiffs support the placement of a statewide advisory question on the upcoming Illinois election ballot, but believe that their question will not be placed on the ballot because the State Board of Elections ("SBE") has determined that their petition is presumptively invalid. For this reason, plaintiffs have brought a class action complaint on their own behalf and on behalf of similarly-situated plaintiffs against defendants David Orr, the Cook County Clerk ("Orr"), members and the executive directors of the Chicago Board of Election Commissioners ("CBE") and the SBE, and the SBE and CBE themselves. Plaintiffs have now moved for a temporary restraining order ("TRO") seeking to stay the SBE proceedings pending this court's proceedings, a declaration that defendants violated plaintiffs' constitutional rights, and a preliminary injunction preventing the SBE from excluding signatures from PMI's petition that were "wrongfully removed." At the same time, defendants have filed motions to dismiss arguing that plaintiffs cannot show any constitutional violation. In addition, a group of registered voters have filed a motion to intervene and their own motion to dismiss.[1] I deny plaintiffs' motions and grant defendants' motions to dismiss. The intervenor-defendants' motions are denied as moot.

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[1] In addition, plaintiffs have moved for class certification, both to certify a class of plaintiffs who were affected by the defendants' actions and the Election Code as well as to certify a class of defendants that includes other Illinois local election officials. This Court has entered and continued that motion pending the outcome of the present motions.

I. The Illinois Election Code and Advisory Public Questions

Illinois' Election Code (the "Election Code") provides for the placement on the statewide ballot, via referendum, of "[a]dvisory questions of public policy." 10 Ill. Comp. Stat. 5/28-1. The Election Code is clear that "no legal effects shall result from the adoption or rejection" of advisory questions. 10 Ill. Comp. Stat. 5/28-6(c). Private citizens may initiate the placement of advisory questions on the ballot through petitions. 10 Ill. Comp. Stat. 5/28-9. Not less than 61 days before a regularly scheduled election, local election officials (i.e., local boards of elections)[2] must certify questions "to be submitted to the voters of or within [their] political subdivision[s]" which will appear on the ballot. 10 Ill. Comp. Stat. 5/28-5. Petitions for advisory questions to be placed on the statewide ballot have a signature requirement of "8% of the total votes cast for Governor in the preceding gubernatorial election." 10 Ill. Comp. Stat. 5/28-9. Only voters may sign the petitions. *Id.* There is no dispute between the parties that, for petitions submitted for advisory questions to be placed on the ballot for the upcoming Illinois election later this year, this rule requires a petition to have approximately 283,000 valid signatures.

Proponents of an advisory question must file with the SBE the "original petition in bound election jurisdiction sections" (the "election jurisdiction section requirement") at least 6 months before the general election. 10 Ill. Comp. Stat. 5/28-9. This means petition proponents must have

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[2] Illinois has 110 election jurisdictions, primarily comprised of Illinois' 102 counties. Eight major Illinois cities (Aurora, Bloomington, Chicago, Danville, East St. Louis, Galesburg, Peoria, and Rockford) also constitute their own separate election jurisdictions.

signers from particular election jurisdictions sign specific petition pages, which must be grouped together, or risk the disqualification of those signatures. *Id.* Petition proponents must also file copies of the petition sheets within seven days with the relevant boards of election. *Id.* The statute also contains other specific requirements for how petition sheets must be submitted. *Id.*

After receiving a petition for an advisory question, the Election Code provides that the SBE staff shall examine petition sheets and their signatures to determine if they conform with the election jurisdiction section requirement. 10 Ill. Comp. Stat. 5/28-10. If the SBE staff determines some are not in conformity, the staff must prepare a list of the nonconforming signatures and notify the petition proponent. On the tenth day following the last day for petition filing, the Election Code provides that the SBE "shall conduct a hearing at which the proponents may present arguments and evidence as to the conformity of any purported nonconforming signatures." *Id.* At the end of the hearing, the SBE must make a final determination about "each purported nonconforming signature." Nonconforming signatures are not counted toward the minimum number of signatures required and are not included in the "random sample verification" procedure described below to allow the SBE to further analyze petition signatures. *Id.*

After these initial election jurisdiction requirement checks, the Election Code provides for further random sampling of the signatures. The Election Code directs the SBE to "design a standard and scientific random sampling method for the verification of petition signatures." 10 Ill. Comp. Stat. 5/28-11. The size of the sample is also set by statute, and must include 10% of signatures if 5,010 or more signatures are involved. *Id.* After selecting a

sampling method and using the method to select a population of signatures to test, the SBE must transmit its list of signatures to the relevant election jurisdictions so that local officials can use the SBE's method to determine whether (1) the person who signed the petition is a registered voter in the election jurisdiction (or was at the time the petition was signed) and (2) the signature of the person who signed the petition "reasonably compares with the signature shown on that person's registration record card." *Id.* Normally local election officials must complete this process within 14 business days. *Id.*

With these results in hand, the SBE must calculate the rate of valid signatures and project the total number of valid petition signatures within each election jurisdiction and statewide. 10 Ill. Comp. Stat. 5/28-12. If this number is not greater than 95% of the minimum number of signatures required to certify the advisory question, then the petition is presumed invalid. *Id.* The SBE must "conduct a hearing for the purpose of allowing the proponents to present competent evidence or an additional sample to rebut the presumption of invalidity." *Id.* At the end of this hearing, the SBE must issue a final order declaring the petition valid (or invalid) and certifying (or not) the advisory question for the ballot. *Id.* If the projection for the total number of valid signatures statewide is greater than 95% (including over 100%) of the minimum number of signatures required, then the result of the sample "shall be considered inconclusive and, if no specific objections to the petition are filed . . . the Board shall issue a final order declaring the petition to be valid and shall certify the proposition for the ballot." *Id.*

The Election Code specifically allows for proponents and opponents to an advisory question to notify the SBE of

their support or opposition and to then observe the sample signature verification. 10 Ill. Comp. Stat. 5/28-13. Proponents and opponents may also "make signed written objections to the [SBE] relating to procedures observed during the conduct of the sample signature verification." *Id.*

II. PMI's Petition for an Advisory Question

The parties do not dispute the facts surrounding PMI's particular petition. PMI timely filed with the SBE a petition to have an advisory question placed on the ballot [3] that included over 347,000 signatures. The SBE undertook its initial analysis to determine whether the petition complied with the election jurisdiction section requirement and determined that 10,000 signatures were not in conformity. PMI had also "lined out" another approximately 10,000 signatures prior to submitting its petition to the SBE because it independently determined that these signatures did not comply with the election jurisdiction requirement (although plaintiffs now contend that this was an "erroneous belief"). The SBE then prepared and sent a report form to local election jurisdictions to use in verifying a random sample of the signatures. The local election jurisdictions were instructed to strike signatures that did not "reasonably compare" with the signature on

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[3] Its proposed advisory question is:

Shall the Illinois General Assembly submit an amendment to Article IX of the Illinois State Constitution to the voters of the State of Illinois at large in the next General Election stating as follows:

> To secure and preserve the benefits of marriage for our society and for future generations of children, a marriage between a man and a woman is the only legal union that shall be valid or recognized in this State?

the voters' registration record cards as well as to determine if the sample signatures came from registered voters. After receiving the results from the relevant election jurisdictions, the SBE projected that PMI's petition contained approximately 91% of number of valid signatures necessary to have the proposed advisory question placed on the ballot, meaning that under the Election Code's criteria, PMI's petition is presumptively invalid.

Pursuant to the Election Code, the SBE has designated a hearing examiner to conduct an evidentiary hearing and to report to the SBE on her findings. That hearing is scheduled to begin on August 5, 2006. At that hearing, PMI, as the proponent of the petition, will have the opportunity to present evidence to rebut the presumption that the petition is invalid. PMI represents that "[g]iven the massive manpower requirements, it is not considered possible for PMI to rehabilitate sufficient signatures to overcome the presumption since it cannot recruit sufficient manpower." The SBE will also sit *en banc* for an evidentiary hearing on August 11, 2006, and will rely on the conclusions of the hearing examiner to make its final decision concerning whether PMI's petition can be certified to be placed on the ballot for the upcoming election.

Plaintiffs have brought a complaint against defendants before this court, and subsequently amended that complaint. Count I of their second amended complaint brings a claim under 42 U.S.C. § 1983 for violations of their First and Fourteenth Amendment rights. Counts II, III and IV bring due process claims on behalf of proposed "Invalid Signature Plaintiff Class", "Out-of-Jurisdiction Plaintiff Class", and a "Not Registered Plaintiff Class" respectively.

III. Legal Standard

Before me are several competing motions. First, plaintiffs have a pending motion for a temporary restraining order and a motion for a preliminary injunction. Second, defendants have filed motions to dismiss. Finally, the proposed intervenor-defendants have filed a motion to intervene and a motion to dismiss. Setting aside the intervenor-defendants' motions, which I will address at the conclusion of this opinion, plaintiffs' motion for a preliminary injunction and defendants' motions to dismiss involve substantially the same issue, whether the relevant provisions of the Election Code and defendants' actions violated plaintiffs' constitutional rights. For purposes of a preliminary injunction, plaintiffs have the burden of demonstrating a reasonable likelihood of success on the merits. *See Joelner v. Vill. of Washington Park, Illinois*, 378 F.3d 613, 619 (7th Cir.2004). For defendants' motions to dismiss there is no such burden; I must accept all well-pled facts in plaintiffs' complaint as true, and, viewing the allegations in the light most favorable to plaintiffs, determine whether they can prove any set of facts to support their claims. *See Thompson v. Illinois Dep't of Prof'l Regulation*, 300 F.3d 750, 753 (7th Cir.2002); *Gomez v. Illinois State Bd. of Educ.*, 811 F.2d 1030, 1039 (7th Cir.1987); *First Ins. Funding Corp. v. Fed. Ins. Co.*, 284 F.3d 799, 804 (7th Cir.2002). While these two burdens might at times contradict, there is no significant dispute between the parties as to the facts relevant to plaintiffs' claims. For this reason, I will consider these respective motions together.

To obtain their desired preliminary injunction and temporary restraining order preventing defendants from disqualifying certain signatures on their petition and staying the SBE's pending proceedings, plaintiffs must

show (1) they are reasonably likely to succeed on the merits; (2) no adequate remedy at law exists; (3) they will suffer irreparable harm which, absent injunctive relief, outweighs the irreparable harm the respondent will suffer if the injunction is granted; and (4) the injunction will not harm the public interest. *Joelner*, 378 F.3d at 613; *Long v. Bd. of Educ. ., Dist. 128*, 167 F.Supp.2d. 988, 990 (N.D.Ill.2001) ("The standards for issuing temporary restraining orders are identical to the standards for preliminary injunctions."). Defendants' motions to dismiss address the first factor, whether plaintiffs have a reasonable likelihood of success, so I will address those motions in conjunction with the first factor.

IV. Reasonable Likelihood of Success on the Merits

Defendants contend that even taking all of plaintiffs' well-pled facts as true, plaintiffs cannot show that defendants violated their constitutional rights or that the Election Code provisions at issue in this litigation are unconstitutional. In contrast, plaintiffs believe that they can show a reasonable likelihood of success on the merits entitling them to injunctive relief. For the reasons discussed below, I agree with defendants that, on the facts as alleged by plaintiffs, the Election Code and the defendants' actions are not unconstitutional.

A. First Amendment Claims

In Count I of their second amended complaint, plaintiffs allege that defendants violated § 1983 by depriving them of their First Amendment rights. They argue that the high number of signatures required in order to place an advisory question on the ballot as well as the "election jurisdiction

section" requirement for the way those signatures must be obtained and submitted place substantial burdens on their rights to engage in "core political speech" and to petition the government for redress of grievances. Further, they argue that the Illinois Election Code is overbroad and that disparities between the number of signatures required for advisory question petitions and other types of petitions is an invalid content-based restriction.

Plaintiffs' arguments are dependent on the conclusion that the Election Code and defendants' actions severely impact their First Amendment rights, because they contend that as a result the defendants' face strict scrutiny, which is very difficult to overcome. However, the Election Code and defendants' implementation of it do not impair plaintiffs' fundamental rights. For that reason, defendants need only show that they have placed reasonable restrictions on plaintiffs' rights that are justified by an important regulatory interest. This they can do, so plaintiffs' First Amendment claims cannot survive.

The Supreme Court has instructed that a court considering a challenge to state election law must weigh

> "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

Burdick v. Takushi, 504 U.S. 428, 434, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983); *Tashijian*

v. Republican Party of Connecticut, 479 U.S. 208, 213-14, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986)). If a regulation places "severe" restrictions on First Amendment rights, it must be "narrowly drawn to advance a state interest of compelling importance." *Id.* (citing *Norman v. Reed*, 502 U.S. 279, 289, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992)). If it imposes more limited restrictions, it is subject to less scrutiny, and "the State's important regulatory interests are generally sufficient to justify" the restrictions. *Id.* (internal citations omitted). Therefore, to determine how to address plaintiffs' First Amendment claims, I first must determine whether the Election Code provisions at issue affect plaintiffs' fundamental rights.

The Seventh Circuit previously addressed the First Amendment implications of regulations governing the submission of advisory questions in *Georges v. Carney*, 691 F.2d 297 (7th Cir.1982). In that case, a group seeking to have an advisory question placed on the ballot in DuPage County brought First Amendment and Equal Protection claims against the DuPage election commissioners (with the SBE as an intervening defendant). At that time, the Election Code provided that advisory question petitions required "the signatures of 25 percent of the registered voters in the subdivision ." *Id.* at 299. The Seventh Circuit noted that this appeared to be one of the first cases concerning "the regulation of ballot propositions rather than of candidacy." *Id.* at 301. The Seventh Circuit held that "there is no constitutional right to use the ballot box as a forum for advocating a policy . . . [and] Illinois therefore has no constitutional obligation to allow advisory questions to be placed on the ballot." *Id.*

Essentially, the Seventh Circuit viewed the issue of advisory questions as one relating to the public forum

doctrine and not one of voting rights. At least as to the plaintiffs' First Amendment claim in that case, the Seventh Circuit held that "Illinois is not discriminating either directly or indirectly against the free expression of controversial ideas. It is merely not providing a novel forum for advocating ideas of any kind, and it has no constitutional obligation to provide such a forum." *Id.* at 302. For this reason, the Seventh Circuit specifically declined to analyze whether the high percentage of signatures required was a First Amendment violation and instead addressed the matter purely as an equal protection question.[4] The logic in this decision applies equally to the present case. The *Georges* decision and the absence of any precedent disagreeing with its decision establish that there is no inherent constitutional right in this Circuit to petition the government by placing an advisory question on the ballot.[5]

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[4] The Seventh Circuit ultimately found no Equal Protection violation in giving preference to government-proposed binding questions over advisory questions because, judged on a rational basis standard, it is not arbitrary for Illinois to give preference to questions "with legal effect" over allowing "another soapbox for the advocates and opponents of great causes." *Id.* at 302.

[5] In their response to defendants' motion to dismiss, plaintiffs contend that *Georges* has been superceded by other public forum cases in which the Supreme Court held that once the government creates a public forum it may only implement "time, place and manner restrictions" provided that those restrictions are "content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45-46, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). However, the Supreme Court has also held that, in a limited public forum created by the government for a limited purpose, the government may still regulate speech as long as any restrictions on speech within the forum are "reasonable in light of the forum's purpose and [do] not constitute viewpoint discrimination." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106, 121 S.Ct. 2093, 150 L.Ed.2d 151

(Continued on following page)

Undeterred by the *Georges* opinion, the plaintiffs rely on a series of Supreme Court cases to argue that the Election Code impermissibly burdens their right to engage in "core political speech." The cases upon which they rely, however, all deal with state regulations limiting a party's ability to circulate binding initiative petitions. In *Meyer v. Grant*, 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988) the Supreme Court addressed regulations relating to Colorado's ballot initiative procedure, through which individuals can place binding initiative propositions on the ballot. *Id.* at 417. The Supreme Court struck down Colorado's criminal prohibition on initiative petition circulators receiving payment. *Id.* The Court recognized that the plaintiffs' "right freely to engage in discussions concerning the need for that change is guarded by the First Amendment" as the circulation of a petition is "core political speech." *Id.* at 421-22. Plaintiffs in this case note that the Court in *Meyer* held that the prohibition against paid circulators restricted the ballot proponents' political expression by restricting who could deliver their message and by "mak[ing] it less likely that appellees will garner the number of signatures necessary to place the matter on

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(2001). *See also Perry Educ. Ass'n*, 460 U.S. at 327. Plaintiff has cited no decisions in which a court determined that a portion of a ballot could be a public forum. And even assuming that the advisory question section of the ballot is a public forum, it is a limited one, for it was expressly created to allow questions of public policy to be voted upon by registered voters. And, for the reasons discussed in this opinion, any regulations defendants have imposed upon petition proponents seeking access to the "forum" are reasonable and are viewpoint-neutral. Plaintiffs continue to contend, however, that the restrictions the state has placed on access to the advisory question portion of the ballot are content-based. They are not-any proponent may follow the same procedural rules to have its advisory question placed on the ballot, regardless of the content of the question.

the ballot, thus limiting their ability to make the matter the focus of statewide discussion." *Id* . at 422-23.

In *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999), the Supreme Court referenced the *Meyer* decision in overturning Colorado regulations requiring binding initiative petition circulators to be registered voters, wear identification badges, and have their names, addresses, and salaries reported. *Id.* at 186. The Court found that these provisions were subject to strict scrutiny and were ultimately unconstitutional because they "significantly inhibit[ed] communication with voters about proposed political change," and because ultimately they affected a party's ability to have an issue placed on the ballot. *Id.* at 192.

These cases do not support plaintiffs' contentions in the case before me, however. Both of these cases overturned restrictions on how parties could interact with the public in speaking about political issues in the course of gathering signatures to submit a ballot initiative, and did not deal with the types of ballot access and petition submission requirements at issue here. In *Meyer*, for instance, the court noted that the prohibition on paid circulators was not justified by the state's interest in protecting the integrity of the initiative process because that interest "is adequately protected by the requirement that no initiative proposal may be placed on the ballot unless the required number of signatures has been obtained." *Meyer*, 486 U.S. at 425-26. In the present case, Illinois has no similar restrictions limiting how circulators can speak to potential signers of their petitions. Plaintiffs argue that the election jurisdiction section requirement does place such a burden because it is more difficult and time-consuming for a circulator to obtain signatures from a potential signatory

while having to leaf through 110 signature pages to find the correct jurisdiction page. While this is clearly more difficult than allowing circulators to compile all signatures in one master list, it does not inhibit the proponent of the advisory question from communicating with signers, only with obtaining their signatures. Obtaining signatures for use in an advisory question petition is not core protected speech.[6]

Simply because plaintiffs have no constitutional right to have their proposed advisory question placed on ballot does not mean that, if the state of Illinois decides to offer that option, it may govern the placement of advisory questions on the ballot however it chooses. The Supreme Court rejected a similar argument in *Meyer*. 486 U.S. at 424-25. But, as the Supreme Court acknowledged in *Buckley*, "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Buckley*, 525 U.S. at 187. The function of the election process is to select candidates and, in the case of

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[6] Similarly, plaintiffs rely on *Buckley* to argue that the Illinois Election Code impermissibly allows content-based restrictions because it only places a high signature requirement and election jurisdiction section requirement on advisory question petitions and not on any other type of petition. However, in *Buckley* the Court found an impermissible content-based restriction from the fact that the restrictions at issue there limited the ability of initiative petition circulators to interact with the public in a way very different from the way other petition circulators could. 525 U.S. at 209-10. The same is true for the other case plaintiffs cite, *Burson v. Freeman*, 504 U.S. 191, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992) in which the Supreme Court struck down a content-based restriction prohibiting only political speech within 100 feet of the entrance to a polling place. *Id.* at 197. Plaintiffs present no precedent, and this court is not aware of any, which would require the state of Illinois to require equal *ballot* access to all types of speech.

binding initiatives, to allow citizens to directly institute laws. Elections do not typically have a "more generalized expressive function." *Storer*, 415 U.S. at 730.

While the Election Code and defendants' actions are subject to some scrutiny, they are not subject to strict scrutiny. In *Burdick* the Court discussed the appropriate level of scrutiny in the context of the state of Hawaii's prohibition on write-in candidates, and distinguished cases in which state activity affected a party's right to vote from cases in which that activity restrained a person's access to the ballot. *Burdick*, 504 U.S. at 438 (holding that a prohibition on write-in candidates was constitutional). The Court clarified that it had "repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls." *Id.* (internal citations omitted).

Applying the test set forth in *Burdick*, the state's regulations and defendants' implementation of those regulations do not subject plaintiffs to "severe" restrictions, but rather "reasonable, nondiscriminatory restrictions" that are constitutionally permissible where the State has important regulatory interests at stake. *Id.* at 434. This is a less heightened level of scrutiny. Here, the state's interest in not having the ballot clogged with a large number of advisory questions for which the public has not demonstrated any significant interest, as well as the state's reasonable desire to prevent fraud in the petition process, justifies the state's reasonable restrictions on petitions for those questions, including the three regulations plaintiffs complain of here: (1) requiring a high number of signatures to place such a question on the

ballot;[7] (2) requiring petitions to be separated by election jurisdiction, and (3) using a reasonable method to assess whether signatures are authentic and come from registered voters.

Plaintiffs also bring a related First Amendment challenge to the Election Code, arguing that the requirements in 10 Ill. Comp. Stat. 5/28-10 and 5/28-11 as to the random sampling for signature validity are facially overbroad as to other petition signers. "The showing that a law punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep,' suffices to invalidate all enforcement of that law, 'until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.'" *Virginia v. Hicks*, 539 U.S. 113, 118-19, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973)). The overbreadth doctrine gives plaintiffs standing to challenge a law as to the effect it would have on other, absent plaintiffs. *Id.* Here, however, for the same reasons

[7] There is precedent that even for cases more clearly within fundamental First Amendment territory, requiring a high number of signatures in order to place a candidate or issue on the ballot is not necessarily unconstitutional. In *Jenness v. Fortson*, 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971) the Supreme Court upheld a Georgia law requiring third-party candidates to file a petition signed by "not less than 5% of eligible voters" in order to be placed on the ballot when such signature requirements did not apply to major-party candidates. *Id.* at 440-41 ("There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before [placing a candidate's name on the ballot] if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.").

discussed with respect to the relevant Election Code provisions as applied to plaintiffs, the statute is not facially overbroad with respect to other signers.

For these reasons, plaintiffs' First Amendment claim cannot succeed and I grant defendants' motion to dismiss it.

B. Equal Protection Claim.

In Count I of plaintiffs' second amended complaint, their § 1983 claim also alleges that defendants have violated the Fourteenth Amendment's guarantee of Equal Protection in two ways. First, they argue that the "content-based" restrictions the Election Code places on advisory question petitions as distinct from other petitions violates equal protection because they treat "different forms" of speech differently. Second, plaintiffs urge that the lack of specific standards in the Election Code or SBE procedures to determine whether petition signatures "reasonably compare" with the signer's registration record card also violates their right to equal protection. Neither of these arguments has merit.

Plaintiffs first contend that the disparate treatment of advisory question petitions and other kinds of petitions must be subject to strict scrutiny because the different treatment affects their right to free speech, to vote, and to petition the government. However, as discussed above, the Election Code provisions at issue and defendants' implementation of them do not affect these fundamental rights, and plaintiffs have cited no precedent supporting this conclusion. Therefore, any legislative distinction between the two types of petitioners satisfies the requirements of equal protection as long as it is rationally related to a legitimate governmental interest. *City of Cleburne, Texas*

v. Cleburne Living Ctr., 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Here, for the same reasons as addressed above, defendants' legitimate interest in preventing petition fraud and in ensuring ballots do not become overburdened with advisory questions is clearly rationally related to the requirements it has set for advisory question petitions. It is rational to treat advisory question petitions more harshly than other types of election-related petitions because these petitions do not raise the same types of voting rights concerns that other petitions do.

Plaintiffs' second equal protection argument is more complicated. Plaintiffs argue that the Election Code and the SBE lack specific standards to determine whether a petition signature "reasonably compares" with a signer's registration record card. The instructions the SBE submitted to local election jurisdictions did not provide additional guidance as to this comparison. Plaintiffs rely on *Bush v. Gore*, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2003), in which the Supreme Court held that standardless voting recount procedures violate equal protection because they create disparities in what different local election jurisdictions within a state define as a valid vote. *Id.* at 106. That case, however, concerned disparate procedures for evaluating votes, thereby implicating a fundamental right. As discussed above, the Election Code procedures to submit a petition for an advisory question do not implicate a fundamental right. Plaintiffs therefore must demonstrate that any potential disparity in treatment between petitioner signatures is arbitrary and capricious. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 60, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). Here, plaintiffs cannot make such a showing. The state has an interest in ensuring that

signatures of advisory questions are accurate, and it is neither arbitrary nor capricious for the SBE to instruct local election jurisdictions to see if the signature "reasonably compares" to a voter's registration record card. As defendants point out, it would be extremely burdensome for the state to have to undertake a more thorough review of signatures, possibly hiring handwriting experts, to examine petition signatures and determine their validity. It is possible and perhaps even probable that these procedures will result in different election jurisdictions analyzing petition signatures differently, but differing results do not violate equal protection principles where they are not a result of arbitrary or capricious policies. *Vance v. Bradley*, 440 U.S. 93, 97, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979) (holding that a statute treating different groups differently did not violate equal protection "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational").

Therefore, I find that even taking the factual allegations in plaintiffs' complaint as true, plaintiffs cannot show that defendants violated their right to equal protection, and I grant defendants' motion to dismiss as to this claim.

C. Procedural Due Process Claims.

Counts II, III and IV of plaintiffs' complaint contend that defendants have committed three distinct procedural due process violations by (1) invalidating petition signatures; (2) invalidating signatures for violating the election jurisdiction section requirement; and (3) invalidating

signatures of non-registered voters, all without notice and an opportunity to be heard.

In assessing whether a government action violates procedural due process, a court must consider

> [T]he private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Matthews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (internal citations omitted).

The key issue in this case is the third factor in this analysis, the burden that would be placed on the defendants to provide notice and an opportunity to be heard to each petition signer whose signature was rejected. Plaintiffs suggest that notice could be given to petition signers by mailing a document to all individuals with signatures in question and allowing them to submit "some form of documentation verifying the individual's identity." Any value this would provide would be drastically overshadowed by the enormous administrative burden this would place on the state to compile a list of contested signatures, mail out information, and then re-assess the validity of any documentation that individuals submitted in response. This would be an enormous task of marginal additional value. *See Tobin for Governor v. Illinois State Bd. Of Elections*, 105 F.Supp.2d. 882, 887 (N.D.Ill.2002) (finding no duty to give signers of petition to place third-party candidates on the ballot notice of a State Election

Board hearing on that petition). Even less burdensome notice, such as taking the time to publish a list of rejected signatures, would still be unduly burdensome to the state.

Further, the private rights of the signer at issue, while perhaps important to individual signers, do not rise to the level of a fundamental right as plaintiffs argue. As discussed throughout this opinion, petition signers do not have a fundamental right to have their advisory question placed on the ballot. In addition, plaintiffs cannot show that the procedures defendants currently have in place create a significant risk to signers of an erroneous deprivation. Although individual signers are not currently afforded notice and an opportunity to be heard, the proponent of a advisory question is afforded both notice and opportunity at two separate stages (both as to an initial conformity check as set forth in 10 Ill. Comp. Stat. 5/28-10, and to contest any presumption of invalidity as set forth in 10 Ill. Comp. Stat. 5/28-12).

As plaintiffs argue with respect to other aspects of their claim, the petition proponent certainly has an equal interest in asserting the validity of signatures as the signers do themselves. With respect to this claim, plaintiffs contest that signers should not "be made subject to the vagaries of a non-profit organization's ability to raise money and to recruit the volunteers it takes with regard to the PMI signer signature rehabilitation efforts." Plaintiffs further argue in their own case that PMI lacks the resources to marshal significant resources to contest the SBE's presumptive conclusion that its signatures are invalid, yet Plaintiffs have presented evidence to this court of a handwriting expert's analysis of certain signatures, affidavits from some petitioners as to purported errors in the invalidations of their signatures, and other evidence

that PMI is aggressively using its opportunity to contest the board's presumptive finding.

Because (1) any further procedural requirements would place a significant burden on the defendants, (2) there is no fundamental right to submit an advisory question petition, and (3) the State already affords plaintiffs a significant level of procedural due process in evaluating advisory question petitions, no further procedural due process is constitutionally required. I therefore grant defendants' motion for summary judgment on Counts II, III and IV of plaintiffs' complaint.

V. Conclusion

Because plaintiffs cannot prove a reasonable likelihood of success on the merits, I need not consider the other elements necessary to grant their motion for a TRO or preliminary injunction. I do note, however, that there is also a serious question as to whether plaintiffs could show that they would suffer irreparable harm if their injunction were not granted. PMI still has two hearings before the SBE and the SBE's hearing examiner to present its arguments, and it is not yet clear what the results of those hearings will be or whether the plaintiffs' will be in a substantially different position after those hearings. Therefore, their motions for injunctive relief from this court may be premature.

As demonstrated above, even taking all of plaintiffs' well-pled facts as true, plaintiffs cannot establish that defendants have committed any constitutional violations. Therefore, I grant defendants' motions to dismiss and deny plaintiffs' motions for a preliminary injunction and for a temporary restraining order. Because I grant the motions

to dismiss, I deny the intervenor-defendants' motion to intervene and motion to dismiss as moot at this time. I also dismiss all other pending motions as moot.

Federal statutes for Petition for Writ of Certiorari
Protect Marriage Illinois, et al., v. David Orr, et al.

28 U.S.C. § 1291 – Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292 (c) and (d) and 1295 of this title.

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28 U.S.C. § 1292(a)(1) – Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

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28 U.S.C. § 1331 – Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

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28 U.S.C. § 1343 – Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section –

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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28 U.S.C. § 2201 – Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act.

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42 U.S.C. § 1983 – Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Illinois Statutes
For Petition for Writ of Certiorari
Protect Marriage Illinois, et al., v. David Orr, et al.

10 ILCS 5/1-1

This Act may be cited as the Election Code. This Act is the general election law of Illinois and any reference in any other Act to "the general election law" or "the general election law of this State" is a reference to this Act, as now or hereafter amended.

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10 ILCS 5/1-3

As used in this Act, unless the context otherwise requires:

. . . 9. "Election Jurisdiction" means (a) an entire county, in the case of a county in which no city board of election commissioners is located or which is under the jurisdiction of a county board of election commissioners; (b) the territorial jurisdiction of a city board of election commissioners; and (c) the territory in a county outside of the jurisdiction of a city board of election commissioners. In each instance election jurisdiction shall be determined according to which election authority maintains the permanent registration records of qualified electors.

. . . 14. "District" means any area which votes as a unit for the election of any officer, other than the State or a unit of local government or school district, and includes, but is not limited to, legislative, congressional and judicial districts, judicial circuits, county board districts, municipal and sanitary district wards, school board districts, and precincts. . . .

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10 ILCS 5/4-6

For the purpose of registering voters under this Article in addition to the method provided for precinct registration under Section 4-7, the office of the county clerk shall be open every day, except Saturday, Sunday, and legal holidays, from 9:00 a.m. to 5:00 p.m. . . .

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10 ILCS 5/5-5

For the purpose of registering voters under this Article 5, . . . the office of the county clerk shall be open between 9:00 a.m. and 5:00 p.m. on all days except Saturday, Sunday and holidays. . . .

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10 ILCS 5/6-29

For the purpose of registering voters under this Article, the office of the Board of Election Commissioners shall be open during ordinary business hours of each week day. . . .

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10 ILCS 5/10-2

. . . [I]f such new political party shall be formed for the entire State, [the petition] shall be signed by 1% of the number of voters who voted at the next preceding Statewide general election or 25,000 qualified voters, whichever is less. . . .

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10 ILCS 5/10-3

Nomination of independent candidates . . . for any office to be filled by the voters of the State at large may also be made by nomination papers signed in the aggregate for each candidate by 1% of the number of voters who voted in the next preceding Statewide general election or 25,000 qualified voters of the State, whichever is less. . . .

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10 ILCS 5/10-8

Certificates of nomination and nomination papers, and petitions to submit public questions to a referendum, being filed as required by this Code, and being in apparent conformity with the provisions of this Act, shall be deemed to be valid unless objection thereto is duly made in writing within 5 business days after the last day for filing the certificate of nomination or nomination papers or petition for a public question, with the following exceptions:

. . . B. In the case of petitions for advisory questions of public policy to be submitted to the voters of the entire State, there shall be a period of 35 business days after the last day for the filing of such petitions in which objections can be filed.

Any legal voter of the . . . State in the case of . . . an advisory public question to be submitted to the voters of the entire State, having objections to any certificate of nomination or nomination papers or petitions filed, shall file an objector's petition together with a copy thereof. . . .

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10 ILCS 19-8(g-5)

If an absentee ballot, other than an in-person absentee ballot, is rejected by the election judge or official for any reason, the election authority shall, within 2 days after the rejection but in all cases before the close of the period for counting provisional ballots, notify the absentee voter that his or her ballot was rejected. The notice shall inform the voter of the reason or reasons the ballot was rejected and shall state that the voter may appear before the election authority, on or before the 14th day after the election, to show cause as to why the ballot should not be rejected. The voter may present evidence to the election authority supporting his or her contention that the ballot should be counted. The election authority shall appoint a panel of 3 election judges to review the contested ballot, application, and certification envelope, as well as any evidence submitted by the absentee voter. No more than 2 election judges on the reviewing panel shall be of the same political party. The reviewing panel of election judges shall make a final determination as to the validity of the contested absentee ballot. The judges' determination shall not be reviewable either administratively or judicially. An absentee ballot subject to this subsection that is determined to be valid shall be counted before the close of the period for counting provisional ballots.

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10 ILCS 5/28-1

The initiation and submission of all public questions to be voted upon by the electors of the State or of any political subdivision or district or precinct or combination of precincts shall be subject to the provisions of this Article. . . .

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10 ILCS 5/28-3

. . . A petition, when presented or filed, shall not be withdrawn, altered, or added to, and no signature shall be revoked except by revocation in writing presented or filed with the board or officer with whom the petition is required to be presented or filed. . . .

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10 ILCS 5/28-4

The provisions of [law] relating to objections to nominating petitions, hearings on objections, and judicial review, shall apply to and govern, insofar as may be practicable, objections to petitions for . . . statewide advisory public questions. . . .

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10 ILCS 5/28-9

. . . Petitions for advisory questions of public policy to be submitted to the voters of the entire State shall be signed by a number of voters equal in number to 8% of the total votes cast for candidates for Governor in the preceding gubernatorial election. Such petition shall have been signed by said petitioners not more than 24 months preceding the date of the general election at which the question is to be submitted and shall be filed with the State Board of Elections at least 6 months before that general election.

The proponents of the proposed Constitutional amendment or statewide advisory public question shall file the original petition in bound election jurisdiction sections. Each section shall be composed of consecutively numbered petition sheets containing only the signatures of registered

voters of a single election jurisdiction and, at the top of each petition sheet, the name of the election jurisdiction shall be typed or printed in block letters; provided that, if the name of the election jurisdiction is not so printed, the election jurisdiction of the circulator of that petition sheet shall be controlling with respect to the signatures on that sheet. Any petition sheets not consecutively numbered or which contain duplicate page numbers already used on other sheets, or are photocopies or duplicates of the original sheets, shall not be considered part of the petition for the purpose of the random sampling verification and shall not be counted toward the minimum number of signatures required to qualify the proposed constitutional amendment or statewide advisory public question for the ballot.

Within 7 business days following the last day for filing the original petition, the proponents shall also file copies of the sectioned election jurisdiction petition sheets with each proper election authority and obtain a receipt therefore.

For purposes of this Act, the following terms shall be defined and construed as follows:

1. "Board" means the State Board of Elections.

2. "Election Authority" means a county clerk or city or county board of election commissioners.

3. "Election Jurisdiction" means (a) an entire county, in the case of a county in which no city board of election commissioners is located or which is under the jurisdiction of a county board of election commissioners; (b) the territorial jurisdiction of a city board of election commissioners; and (c) the territory in a county outside of the jurisdiction of a city board of election commissioners. In each instance

election jurisdiction shall be determined according to which election authority maintains the permanent registration records of qualified electors.

4. "Proponents" means any person, association, committee, organization or other group, or their designated representatives, who advocate and cause the circulation and filing of petitions for a statewide advisory question of public policy or a proposed constitutional amendment for submission at a general election and who has registered with the Board as provided in this Act.

5. "Opponents" means any person, association, committee, organization or other group, or their designated representatives, who oppose a statewide advisory question of public policy or a proposed constitutional amendment for submission at a general election and who have registered with the Board as provided in this Act.

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10 ILCS 5/28-10

Upon receipt of an original petition for a proposed Constitutional amendment or statewide advisory public question, the designated Board staff shall examine the petition sheets in each election jurisdiction section for conformity with the single jurisdiction signature requirement prescribed in Section 28-9. The Board staff shall determine from the name of the election jurisdiction printed at the top of the petition sheet or from the election jurisdiction of the circulator of that petition sheet, as the case may be, whether any signatures on that sheet are not in conformity. If any signatures are determined to be nonconforming, the Board staff shall prepare, for each election jurisdiction section, a list by page and line number

of purported nonconforming signatures and shall immediately transmit such lists to the Board Chairman and copies of such lists to the principal proponent of the proposed Constitutional amendment or statewide advisory public question, or the proponent's attorney, whichever is designated on the certificate attached to the petition, as provided in Section 10-8 of this Code.

On the 10th business day following the last day for petition filing, the Board shall conduct a hearing at which the proponents may present arguments and evidence as to the conformity of any purported nonconforming signatures. At the conclusion of the hearing the Board shall make a final determination with respect to each purported nonconforming signature. Any signatures on petition sheets in an election jurisdiction section finally determined to be nonconforming shall not be considered part of the petition for the purpose of the random sample verification and shall not be counted toward the minimum number of signatures required to qualify the proposed Constitutional amendment or statewide advisory public question for the ballot.

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10 ILCS 5/28-11

The Board shall design a standard and scientific random sampling method for the verification of petition signatures. . . .

Each election authority with whom jurisdictional copies of petition sheets were filed shall use the proven random sampling method designed and furnished by the Board for the verification of signatures shown on the list supplied by the Board and in accordance with the

following criteria for determination of petition signature validity:

1. Determine if the person who signed the petition is a registered voter in that election jurisdiction or was a registered voter therein on the date the petition was signed;

2. Determine if the signature of the person who signed the petition reasonably compares with the signature shown on that person's registration record card. . . .

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10 ILCS 5/28-12

Upon receipt of the certificates of the election authorities showing the results of the sample signature verification, the Board shall [determine] . . . [i]f such statewide projection establishes a total number of valid petition signatures not greater than 95.0% of the minimum number of signatures required to qualify the proposed Constitutional amendment or statewide advisory public question for the ballot, the petition shall be presumed invalid; provided that, prior to the last day for ballot certification for the general election, the Board shall conduct a hearing for the purpose of allowing the proponents to present competent evidence or an additional sample to rebut the presumption of invalidity. At the conclusion of such hearing, the Board shall issue a final order declaring the petition to be valid or invalid and shall, in accordance with its order, certify or not certify the proposition for the ballot.

If such statewide projection establishes a total number of valid petition signatures greater than 95.0% of the minimum number of signatures required to qualify the . . .

statewide advisory public question for the ballot, the results of the sample shall be considered inconclusive and, if no specific objections to the petition are filed pursuant to Section 10-8 of this Code, the Board shall issue a final order declaring the petition to be valid and shall certify the proposition for the ballot.

In either event, the Board shall append to its final order the detailed results of the sample from each election jurisdiction which shall include: (a) specific page and line numbers of signatures actually verified or determined to be invalid by the respective election authorities, and (b) the calculations and projections performed by the Board for each election jurisdiction.

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10 ILCS 76/5

Congressional districts. The State of Illinois is divided into 19 congressional districts as follows:

. . . Congressional District No. 19 shall be comprised of the following units of census geography: The County(s) of Bond; Within the County of Christian . . . The County(s) of Clay, Clinton; Within the County of Edwards . . . The County(s) of Effingham; Within the County of Fayette . . . Within the County of Gallatin . . . Within the County of Greene . . . The County(s) of Hamilton, Hardin, Jasper, Jefferson; Within the County of Jersey . . . The County(s) of Johnson; Within the County of Lawrence . . . Within the County of Madison . . . The County(s) of Marion, Massac; Within the County of Montgomery . . . The County(s) of Pope, Richland; Within the County of Saline . . . Within the County of Sangamon . . . Within the County of Shelby . . . Within the County of Wabash . . . The County(s) of

Washington, Wayne; Within the County of White . . . Within the County of Williamson. . . .

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810 ILCS 5/3-308

Proof of signatures and status as holder in due course.

(a) In an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings. If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity, but the signature is presumed to be authentic and authorized unless the action is to enforce the liability of the purported signer and the signer is dead or incompetent at the time of trial of the issue of validity of the signature. If an action to enforce the instrument is brought against a person as the undisclosed principal of a person who signed the instrument as a party to the instrument, the plaintiff has the burden of establishing that the defendant is liable on the instrument as a represented person pursuant to Section 3-402(a).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Protect Marriage Illinois, *et al.*, Plaintiffs,	**No. 06 C 3835**
	COMPLAINT
	Judge Elaine E. Bucklo
v.	**Magistrate Judge Morton Denlow**
David D. Orr, *et al.*, Defendants.	

SECOND AMENDED CLASS ACTION COMPLAINT

(July 21, 2006)

Plaintiffs Protect Marriage Illinois ("PMI"), Peter L. LaBarbera, David E. Smith, individually and on behalf of Protect Marriage Illinois and Robert Pajor, Sheryl Amato and Cynthia Smith, petition signers on behalf of themselves and as representatives of all persons similarly situated, by their attorneys, Michael E. Lavelle and Kevin E. Bry of Lavelle & Motta, Ltd., and for this class action complaint against the Cook County Clerk ("Clerk Orr"), members of the Chicago Board of Election Commissioners ("CBEC"), and members of the Illinois State Board of Elections ("SBE"), state as follows:

NATURE OF THE ACTION

1. This is a civil action for declaratory and injunctive relief arising from the deprivations by defendants of Plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution, specifically,

Plaintiffs deprivations of the freedom of the right to vote, and the freedoms of: speech, of association, of the right to petition government for redress from grievances, of equal protection; and in addition, the denial of substantive due process and of procedural due process; all done in connection with a statewide advisory petition to the Illinois General Assembly which concerns a public question about marriage which all plaintiffs advocate. The petition seeks to have the question presented to the voters at the November 2, 2006 general election. See **Exhibit** 1 attached. These rights of plaintiffs are paramount and may not be denied.

2. This action further arises under Illinois State Law.

3. The Illinois statewide advisory petition system deprives voters of all of the foregoing rights, rights deserving of protection.

JURISDICTION AND VENUE

4. ***Jurisdiction***. This action arises under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983; jurisdiction is invoked pursuant to 28 U.S.C. §§ 1331 (federal question) and 1343 (deprivation of civil rights) and 2201 (declaratory relief).

5. ***Venue***. Venue is proper because the majority of the events out of which the claims arise occurred in this judicial district.

PARTIES

6. Plaintiff Protect Marriage Illinois ("PMI") is an unincorporated association and a proponent of the State-wide Petition, and registered as such with the SBE. It advocates the adoption of the question proposed in the petition and caused the circulation and filing of the petition. PMI is headquartered in DuPage County.

7. ***Parties***. Plaintiffs' Peter L. LaBarbera ("LaBarbera") and David E. Smith ("Smith") are the executive director and project manager respectively of Plaintiff Protect Marriage Illinois ("PMI"). Messrs. LaBarbera and Smith actively worked on the promotion of the petition including having signed the petition and having circulated petition sheets.

8. Plaintiff Robert Pajor, a registered voter in Illinois and signer of the petition is registered to vote and residing in DuPage County. He had his signature stricken from the petition sheet, by the SBE and the Election Authorities, because of an allegation that his signature did not "reasonably compare," in the eyes of an election authority employee, with his signature on his registration record card. He is a ("Invalid Signature Class") plaintiff.

9. Plaintiff Sheryl Amato is a registered voter in Illinois residing in DuPage County and a signer of the petition whose signature was stricken by the SBE and the Election Authorities from the petition sheet upon an allegation that she is not a registered Illinois voter within the election jurisdiction designated on the petition sheet she signed. This plaintiff then, is an out-of-jurisdiction plaintiff ("Out-of-Jurisdiction Class").

10. Plaintiff Cynthia Smith is a registered Illinois voter who has signed the petition and was stricken from the petition because of an allegation that she was not registered to vote at the address listed opposite her signature on the petition. This plaintiff is a not registered plaintiff ("Not Registered Plaintiffs") and resides in DuPage County.

11. All plaintiffs except PMI, are registered to vote in Illinois, and desire to vote for the Statewide Petition question in the general election of November 2, 2006. PMI desires to actively promote the question to voters to vote in favor of adoption of the question of that election.

12. These plaintiffs all had their fundamental rights deprived by the SBE and the defendant election officials.

13. ***Defendants***. Defendant David D. Orr, the Cook County Clerk ("Clerk Orr"), is an election authority official charged with administering elections in that part of Cook County outside the City of Chicago. He is responsible, in addition to other official duties, for providing services to voters, candidates, election judges, the public and to petition proponents in addition to the preparation of the ballot, the conduct of the election in the election precincts under his jurisdiction and the compilation and certification of the election results.

14. Defendants Neal, Petrone and Cowen are all members of the CBEC and election authority officials for the City of Chicago. The CBEC is responsible for providing services similar to the election services described for Clerk Orr but only within Chicago. Defendant Gough is their executive director and implements CBEC policies.

15. Clerk Orr and the CBEC are collectively the "Election Authorities."

16. Defendants Neal, Rednour, McGuffage, Schneider, Porter, Brady, Keith and Walters are all members of the SBE; Defendant White implements SBE policies as their executive director. The SBE has general supervision over the administration of voter registration and elections in the state. The SBE works closely with the Election Authorities and provides them with assistance to conduct elections affectively.

17. All defendants are sued in their official capacities.

PLAINTIFFS' CLASS ALLEGATIONS

18. Plaintiffs Robert Pajor and Sheryl Amato bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

19. ***Invalid Signature Plaintiff Class Definition.*** This proposed class ("Invalid Signature Class") so represented in this action by the plaintiffs described in paragraph 8, and of which these plaintiffs are members and tentatively defined as:

> All persons who signed as petitioners on the Statewide Petition and whose names were stricken from the petition by the actions of the SBE and the Election Authorities upon an allegation of invalidity of their signatures in that their signatures do not reasonably compare to the signatures of the persons the signers purport to be on the voters registration card. These voters were not (and will not be) given any notice by the

SBE or the Election Authorities and an opportunity to defend the validity of their signatures.

20. ***Out-of-jurisdiction plaintiff class definition.*** This proposed class ("Out-of-Jurisdiction Class") so represented by the plaintiffs described in paragraph 9 above, and of which these plaintiffs are members is tentatively defined as:

> All persons who signed as petitioners on the Statewide Petition and whose names were not considered to be part of the petition for the purpose of the random signature sampling conducted as set out in 10 ILCS 5/28-11 by the SBE and Election Authorities, because their address in the petition was not within the election jurisdiction designated on the petition. Their names were also not counted toward the minimum number required to qualify the Statewide Petition for the ballot.

21. ***Not registered plaintiff class definition***. This proposed class ("Not registered Class") so represented by the plaintiffs described in paragraph 10 and of which these plaintiffs are members is tentatively defined as:

> All petition signers on the Statewide Petition whose names were stricken upon an allegation of not being registered to vote at the address shown opposite their signatures and not given notice of the allegation (nor will be given notice) by the SBE or the Election Authorities and an opportunity to defend.

The Rule 23(a) Criteria are all met.

22. ***Numerosity***. While the exact number of the members of these classes is unknown to plaintiffs at this

time. Each class of the petition signers whose signatures were stricken and their fundamental rights deprived is in the thousands. The class is so numerous that joinder is rendered impossible.

23. ***Commonality as to "invalid signature class".*** Questions of law and fact exist arising from the SBE's failure to provide due process to these petition signers, as well as the failure of the Election Authorities to do so, which resulted in their signatures being stricken upon the allegation that their signatures did not reasonably compare. Such questions are common to all class members and predominate over any question affecting only individual members of the class. The many questions of law and fact common to this proposed class include; in part:

a. Whether the SBE and Election Authority signature validation process comports with the First and Fourteenth Amendments.

b. Whether these plaintiffs were deprived of these fundamental rights because of the signature verification system and the actions of defendants.

24. ***Commonality as to the "out-of-jurisdiction class".*** Questions of law and fact arise from the SBE's failure to consider the signatures of this proposed class in the random sample process and from the SBE's refusal to count these signatures toward the minimum number of signatures required to qualify the Statewide Petition for the ballot. Such questions are common to all class members and predominate over any questions only affecting individual members of the class. The many questions of law and fact common to this class include, in part:

a. Whether the deletion of these plaintiffs' signatures because of the later designation of the petition sheet to an election jurisdiction other than the election jurisdiction(s) in which these plaintiffs reside, comports with the requirements of the First and Fourteenth Amendments.

b. Whether these plaintiffs were deprived of their fundamental rights because of the petition signer requirement that the plaintiffs signatures were not and will not be considered or counted due to being registered to vote in an election jurisdiction other than the one indicated on the petition.

25. ***Commonality as to the "nonregistered class).*** Questions of law and fact exist arising from the SBE and the Election Authorities' failure to provide due process to these petition signers who were alleged to be nonregistered voters and whose signatures were stricken. Such questions are common to all class members and predominate over any questions only affecting individual members of the class. The many questions of law and fact common to this proposed class include, in part:

a. Whether the provision of sec. 28-11, Illinois Election Code, with respect to voter registration verification for petition signers without due process comport with the constitutional requirements of the First and Fourteenth Amendments.

b. Whether the plaintiffs were deprived of these fundamental rights because of the Illinois petition signature verification systems.

26. ***Typicality.*** The claims of each of these plaintiff classes are typical of their respective classes. Each member of each class suffered injury as a result of the SBE and the Election Authorities' violations of their First and Fourteenth Amendment rights.

27. ***Adequacy of representation.*** Each class of plaintiffs will fairly and adequately protect the interests of their respective classes. Each of these plaintiff classes have an interest in obtaining declaratory and injunctive relief for the deprivations of their respective constitutional rights and their interests are consistent with, and not antagonistic to, the interests of any member of their class and this is true as to the members of all classes. These plaintiffs are committed to the vigorous prosecution of this action and the proposed counsel for each of these classes is experienced in complex litigation with special expertise in constitutional issues in ballot cases.

28. ***The Rule 23(b) categories.*** Additionally, because the issues are deprivations of fundamental rights, this case satisfies the FRCP 23(b)(2). The defendant SBE and election authorities will refuse to correct the First and Fourteenth Amendment violations for these plaintiff classes because there is no provision in the Illinois Election Code to allow them to do so, thereby demanding declaratory and injunctive relief.

DEFENDANT CLASS ALLEGATIONS

29. Plaintiffs also bring this action against certain defendants as representatives of a defendant class pursuant to Rule 23 of the Federal Rules of Civil Procedure. These defendants are the Election Authorities, the county clerks (except DuPage which is a County Board of Election

Commissioners), Clerk Orr and the members of the CBEC, and the other Boards of Election Commissioners ("Election Authorities").

30. ***Class definition.*** The proposed defendant class ("Defendant Class") so represented by Clerk Orr and the CBEC in this action, and of which defendants are members, is tentatively defined as:

> All Election Authorities who have found signers' signatures on the Statewide Petition invalid because of allegations the signers were either: (i) not registered to vote; or, (ii) their signatures did not reasonably compare to their voter registration card and who are responsible for those signatures not being counted as invalid and who failed to provide to voters the protections of their fundamental rights to which the members of these plaintiff classes are entitled to.

The Rule 23(a) Criteria are all met.

31. ***Numerosity.*** Numerosity is met in this defendant class. There are 110 election authorities (101 county clerks, 1 county board of Election Commissioners and 8 city Boards of Election Commissioners) who, as part of their responsibilities, prepare the ballot, and administer and conduct the election in the precincts under their jurisdiction. The SBE works closely with these election authorities by providing information and general supervision necessary for the elections to be conducted effectively in accordance with Illinois law. All Election Authorities and the SBE operate under the Illinois Election Code.

32. ***Commonality***. Questions of law and fact exist arising from the defendants' failure to avoid the deprivations

to the plaintiffs of their fundamental rights under the First and Fourteenth Amendments. Such questions are common to all defendant class members and predominate over any questions affecting only individual members of the class. The many questions of law and fact common to the defendant class include, in part:

a. Whether these defendants failed to avoid the deprivation of the First and Fourteenth Amendment rights of the plaintiffs in striking petition signer signatures as invalid.

b. Whether these defendants deprived the plaintiffs of their procedural due process rights because they failed to give notice to the petition signers whose signatures were alleged to be invalid nor any opportunity to defend their signatures.

33. ***Typicality***. Defendants have defenses that are typical of the class which are that they are following the law and the instructions of the SBE with regard to their actions. The Election Authorities are provided with instructions and guidance from the SBE whose objective is to create a uniform system of elections throughout the state. There is no provision in the Illinois Election Code nor is there any instruction or guidance from the SBE to allow the Election Authorities to avoid the deprivation of the Plaintiffs' fundamental rights nor is there a provision for notice and opportunity for hearing before their signature is stricken. This defendant class will assert defenses that are representative of those that will be asserted by all the members of the class.

FACTUAL ALLEGATIONS

Giving Rise to §1983 Claims

34. PMI timely filed the Statewide Petition with the SBE on May 8, 2006 and with the 110 Election Authorities within 7 days thereafter. Each petition sheet was required to have the name of the election jurisdiction in which the petition signers were registered to vote on the petition sheet but this indication was not required to be present when the sheet was circulated to the signers. The filings with each Election Authority consisted of copies of the original sheets filed with the SBE, bundled according to the election jurisdiction to which the bundled sheets were dedicated. Each bundle only related to one Election Authority.

35. The election jurisdiction designation was not placed the petition sheet until after it was circulated due to the belief of PMI that this is what the law required. If a signer was not registered to vote in the election jurisdiction where the bundle was filed, it was held to be "nonconforming" by the SBE and not counted by it for any purpose.

36. The petition was required to contain a minimum of approximately 283,000 signatures and did contain in excess of 347,000 signatures.

37. The SBE undertook its petition election jurisdiction "conformity" examination and discounted all nonconforming signatures, *i.e.*, determined those signatures would not be counted towards the minimum number needed to qualify the petition question for the ballot. This SBE conformity examination found that approximately

10,000 signers were nonconforming. These signatures were then deleted from the petition.

38. There were, in addition, another approximately 10,000 out-of-jurisdiction nonconforming signatures that, prior to filing, had been "lined out" by PMI agents drawing a line across the signature and address of the signer. This lining out was done by PMI in the erroneous belief it was required to do so because the election jurisdiction for the voter was nonconforming.

39. 10 ILCS 5/28-3 does not permit signatures to be removed from the petition in that manner. Such attempted striking of the signatures has no effect on the signatures.

40. The Board treated these lined out signatures as though they did not exist and did not include them in their count of the total number of signatures filed.

41. There are then, on information and belief, approximately 20,000 petition signers who were stricken from the petition for this nonconforming reason.

42. After the completion of the conformity examination, the SBE undertook, pursuant to 10 ILCS 5/28-12, to prepare a scientific formula for verifying the validity of a percentage of the signatures and after the verification examination of the sample signatures was concluded, projected the total number of valid signatures on the Statewide Petition.

43. The SBE prepared a report form (see **Exhibit** 3 attached) for each Election Authority to use in determining the validity of signatures and to record their findings in the manner set forth in the SBE instructions provided for the conduct of the examination. See **Exhibit** 2 attached.

44. The SBE instructions did not provide any information for the Election Authority to make a determination as to whether the signature was actually that of the registered voter it purported to be. These instructions only instructed that the signature be found invalid if it did not reasonably compare.

45. The instructions did not allow any factor other than a "reasonably compares" factor for the Election Authority employees to follow in determining the validity of a signature. Consequently, age of the voter at the time of registration, which can be determined from the voter registration card, was not allowed to be considered.

46. A person's signature changes over time.

47. Few true determinations can be made as to the genuineness of a signature by comparison of a signature if the signature was affixed following an illness, *e.g.,* a stroke, and the signature does not reasonably compare as a result. Or, if affixed while standing in the cold outside, when signing on a clipboard or when signing in a hurry which results in the signature being quite different than if the voter was sitting at a desk and signing in an unhurried fashion.

48. All the signatures being held invalid are the result of the actions of the SBE and Election Authorities.

49. The requirement that a signature must reasonably compare with the voter's signature on her voter registration record card is facially unconstitutional as overbroad.

50. The SBE gave no notice to the petition signers whose signature was invalidated that their signature

would not be counted by the SBE unless somehow rehabilitated by PMI.

51. However, the signature could not be rehabilitated if the signer's signature had in fact changed to the point where the signer's signature does not reasonably compare with the signers signature on his/her voter registration card.

52. A petition signer will not be allowed to appear on his/her own behalf at the SBE hearing to defend the validity of her signature.

53. signer may be validly registered to vote at the address opposite his/her name but the Election Authority is unable to verify such person is validly registered due to the inability to find the voter's record.

54. The Election Authorities certified the results on a certification form provided by the SBE. See **Exhibit** 4 attached.

55. 10 ILCS sec. 5/28-11[1] sets out the criteria for determining signature validity to be: (a) whether the petition signer was registered to vote at the address opposite the signature in the election jurisdiction for the sheet he/she signed; and, (b) whether the signer's signature "reasonably compares" with the signature shown on that person's registration record card.

56. No provision was made by the SBE to require a determination as to whether the signature was in fact that of the registered voter it purports to be.

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[1] All statutory references hereafter are to the Illinois Election Code, 10 ILCS 5/1-1 *et. seq.* unless otherwise stated.

57. Sec. 5/28-3 only requires a petition signer to sign in his/her "own proper person." The signer is not required, nor instructed, to sign in a way that reasonably compares with his/her signature on his/her voter registration card.

58. The Election Authorities made no attempt to give notice to a signer whose signature was alleged by them to be invalid so that the signer could defend his/her signature before the Election Authority alleging its invalidity.

59. The SBE made no attempt to notify the petition signers that their signature was stricken or that the signer could appear before the SBE at this evidentiary hearing and show that the signature was genuine before the SBE issued a final order on the signature's validity. Nor will the SBE make any such attempt to do so since no provision in law requires or allows it.

60. Following the application of the scientific formula to the sample results, the SBE projected that approximately 91% of the signatures on the petition were valid. This percentage was approximately 4% below the 95% validity required and resulted in the Board making a determination that the entire petition was presumptively invalid.

61. The SBE is then required to conduct an evidentiary pursuant to 10 ILCS 5/28-12 to allow the petition proponent, PMI, to present evidence or an additional sample to rebut the presumption.

62. The SBE has designated a hearing examiner to take and rule on the evidence or additional sample in connection with this evidentiary hearing and make a report to the Board on her findings. The hearing examiner has set this hearing to begin on Saturday, August 5, 2006.

63. The SBE, sitting *en* banc, will begin its evidentiary hearing on August 11, 2006 using primarily, the report and recommendation of the hearing examiner for making its final decision.

64. Following this hearing, the Board will issue a final order declaring the validity or invalidity of the petition. Given the massive manpower requirements, it is not considered possible for PMI to rehabilitate sufficient signatures to overcome the presumption since it cannot recruit sufficient manpower.

65. All of the exhibits attached to this complaint are true and correct copies of the documents they purport to be and are from the records and files of the SBE.

66. The out-of-jurisdiction signature nullification as nonconforming is constitutionally flawed in that it places a severe burden on the Statewide Petition circulators which is not imposed on other statewide nor multi-county petition circulators.

67. For example, advisory petitions may be circulated in the 19th congressional district of Illinois which has within its boundaries 30 counties (election jurisdictions). No election jurisdiction limitation is imposed on petition signers in this district to only sign a sheet that is designated for the election jurisdiction of their voter registration address. Nor are the petition proponents required to bundle the sheets by election jurisdiction.

68. The requirement of single election jurisdiction sheets burdens the circulators, *e.g.*, it would require a circulator to carry many dedicated petition sheets to ensure that he has the correct sheet when approaching petition signers to discuss the proposed question. He

would also have to spend time with the petitioner in determining which election jurisdiction in which he/she resides even before discussing the petition question; and then find amongst his many sheets the proper sheet for that person to sin.

69. To be certain, a circulator would have to carry 110 different election jurisdiction sheets while he/she goes about approaching petition signers.

70. It is especially burdensome when the circulator is approaching potential signers at a location where signers are, *e.g.,* heading to or from a train or a sports event. Such persons are more likely to be in a hurry and often will not wait while discussion about the place of residence and a search for the proper sheet is made. And, if the circulator were standing at an entrance to Wrigley Field at a Cubs game which draws attendees from all over the state, he/she would necessarily need to possess all 110 petition sheets and laboriously search through them while the potential signer waits (if he/she will wait), to find the appropriately designated petition sheet.

71. Such election jurisdiction sheet limitation and the delays caused thereby, result in a severe diminishment in the number of petition signers that can be approached to determine whether they will sign the petition.

72. The statement of the petition signers in the heading of the Statewide Petition is, in part, "We, the undersigned, registered and qualified voters of the State of Illinois . . . do hereby PETITION . . . " and this statement is necessary for the petition to be in compliance with law.

73. The language of the heading of the petition is, in part, a statement by the petition signers that they are duly qualified voters in the State of Illinois.

74. Nothing in that heading informs the voter that he/she can only sign a petition sheet that is dedicated, or will be dedicated, to a certain election jurisdiction.

75. Nothing anywhere on the petition sheet informs the voter he/she will forfeit his/her signature if the sheet he/she signs does not contain the indication of the election jurisdiction to which that sheet will be dedicated.

76. The voter is effectively deceived then, into believing he/she has properly associated with the other petition signers to petition the state government for redress of grievances when informed by the petition heading that he/she is apparently eligible to sign.

77. 10 ILCS 5/28-9 does not require a petition sheet to have the name of the election jurisdiction for whom the petition will be bundled indicated on the sheet while it is being circulated to voters.

78. The limitation that a petition sheet may only apply to a single election jurisdiction is arbitrary, capricious and impinges on the fundamental rights of the petitioners. Further, it diminishes the ability of the circulators to approach a sufficient number of voters to discuss the proposed question in order to obtain sufficient support to qualify the petition for the ballot.

79. The limitations imposed upon circulators of only circulating a petition sheet to voters from a designated election jurisdiction deprives the proponents, circulators and petition signers of their fundamental rights.

80. The provisions of 10 ILCS 5/28-9 to 5/28-13 are provisions relating to statewide advisory petitions.

81. No similar provisions relate to statewide candidate petitions nor to any multi-county petition whether candidate or advisory.

82. The circulation of the Statewide Advisory petition is core political speech in that the circulator is engaging in one on one interactive discussions with voters for their support.

83. Core political speech limitations are subject to heightened scrutiny; in fact, it is subject to the highest scrutiny, *i.e.*, scrutiny at its zenith.

84. The minimum number of signatures required for the Statewide Petition to qualify for the ballot is approximately 283,000 while the minimum number for a statewide new political party or an independent statewide candidate is 25,000.

85. The 283,000 signature requirement is approximately 8% of the votes cast for governor in the preceding gubernatorial election. The 25,000 signatures is based on 1% of the number of voters who voted in the last general election or 25,000 voters, whichever is less.

86. Requiring the Statewide Petition proponents to collect a minimum of approximately 258,000 petition signatures more than statewide candidates and statewide new political parties is an unconstitutional burden on the Statewide Petition proponents.

87. The SBE sitting in a quasi-judicial capacity or otherwise, does not have the power to decide constitutional issues.

88. The First and Fourteenth Amendment requires that all eligible voters be given an equal opportunity to sign a statewide advisory petition.

89. The right to vote is implicated when an advisory petition supporter desires to vote on the petition question.

90. There is no standard to allow an election authority employee to determine whether the signature is actually that of the registered voter if he/she reasonably believes the signature on the petition does not compare to the signature of that registered voter.

91. Voters serving in the U.S. Military and residing in Illinois for at least 30 days before an election are allowed to vote without being registered in the election precinct of their residence.

92. Unregistered but qualified U.S. Military voters will have their signature held invalid if the sheet and line number of the Statewide Advisory petition upon which they signed was selected for verification in the random sample or if challenged in an Objector's petition.[2]

93. Military voters, as Illinois residents are qualified to sign the Statewide Petition in association with other petition signers.

94. The SBE will make a final determination as to the validity of the Statewide Advisory petition at a hearing

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[2] Sec/ 5/28-4 allows any legal voter of the state to challenge a Statewide Advisory petition if he or she has objections to the petition by filing an objector's petition. Legal voters have recently filed an objectors' petition against the Statewide Petition but all proceedings on that petition have been suspended pending the outcome of the August 11, 2006 SBE evidentiary hearing.

commencing on August 11, 2006. If competent evidence or an additional petition sample sufficient to rebut the presumption of invalidity is not presented to the SBE hearing examiner by PMI and reported to the SBE by the hearing examiner, the SBE's final determination will be that the petition is invalid.

95. 10 ILCS 5/28-4 allows any legal Illinois voter to challenge the validity of the Statewide Advisory petition. Legal voters have already challenged the petition. Proceedings are going forward subject to the final determination of the SBE in its 10 ILCS 5/28-12 hearing of August 11, 2006.

96. Citizens possess a fundamental interest in the right to petition government to redress grievances, in their right to free speech, in their right to freely associate, in their right to vote and in their rights to equal protection and due process. These rights are deserving of protection. The state cannot discount petition signers from having their signatures count on a petition to government for redress without affording the appropriate due process. The state is able to regulate the advisory petition process in a manor consistent with the equal protection clause and consistent with the plaintiffs fundamental rights but has not chosen to do so. All the plaintiffs were denied their fundamental rights by the state actors. The petition signers were denied their right to due process by the state removing their signatures from the petition without notice and thereby not counting the signatures towards the minimum number required to qualify the petition for the ballot. It is the whole statewide scheme of state validation of the petition signatures that deprives the plaintiffs of their fundamental rights.

COUNT I

Claims of all plaintiffs against the SBE and Election Authorities for the violation of Rights Guaranteed by the United States Constitution

97. Paragraphs 1 through 96 are incorporated here.

98. The actions of the SBE and of the Election Authorities, as described herein, have denied and infringed upon the fundamental rights guaranteed to plaintiffs by the First and Fourteenth Amendments.

99. The actions of the SBE and of the Election Authorities described herein were taken under color of state law in direct violation of all plaintiffs' fundamental constitutional rights, and are therefore actionable under 42 U.S.C. §1983.

100. Because of the actions of the SBE and of the Election Authorities, all plaintiffs have suffered direct and immediate violation of their fundamental rights guaranteed by the United States Constitution and are therefore entitled to injunctive and declaratory relief under FRCP Rules 57 and 65, to redress, remedy, and to prevent future violations of their rights and the rights of others.

COUNT II

Claims of the proposed "Invalid Signature Plaintiff Class" for Violation of their Right of Due Process Guaranteed by the United States Constitution

101. Paragraphs 1 through 100 are incorporated here.

102. The actions of the SBE and Election Authorities as described herein have infringed upon the Due Process Rights guaranteed to this proposed Invalid Signature Plaintiffs Class by the United States Constitution.

103. These state actions were and are in violation of this plaintiff class' fundamental rights as citizens, voters and petitioners to the state to redress grievances.

104. These state actions were taken under color of state law in direct violation of the plaintiff class' constitutional rights, and are therefore actionable under 42 U.S.C. §1983.

105. Because of the actions of the SBE and Election Authorities, this plaintiff class has suffered direct and immediate violation of fundamental rights pursuant to FRCP Rules 57 and 65, to redress, remedy, and to prevent future violations of fundamental rights and the fundamental rights of others.

COUNT III

Claims of the Proposed "Out-of-Jurisdiction Plaintiff Class" for Violation of their Right of Due Process Guaranteed by the United States Constitution

106. Paragraphs 1 through 105 are incorporated here.

107. The actions of the SBE and Election Authorities as described herein have infringed upon Fundamental Rights including the Due Process Rights guaranteed to these Out-of-Jurisdiction plaintiffs by the United States Constitution.

108. These state actions were and are in violation of this plaintiff class' rights as citizens, voters and petition signers.

109. These state actions were taken under color of state law in direct violation of this plaintiff class' constitutional rights, and are therefore actionable under 42 U.S.C. §1983.

110. Because of the actions of the SBE and Election Authorities, this plaintiff class has suffered direct and immediate violation of fundamental rights pursuant to FRCP Rules 57 and 65 to redress, remedy, and prevent future violations of their rights and the rights of others.

COUNT IV

Claims of the Proposed "Not Registered Plaintiff Class" for Violation of their Right of Due Process Guaranteed by the United States Constitution

111. Paragraphs 1 through 110 are incorporated here.

112. The actions of the SBE and Election Authorities against petition signers as Not Registered have infringed upon the Due Process Rights guaranteed to these plaintiffs by the United States Constitution.

113. These state actions were and are in violation of this plaintiff class' rights as citizens, voters and petitioners to the state to redress grievances.

114. These state actions were taken under color of law in direct violation of this plaintiff class' constitutional

rights, and are therefore actionable under 42 U.S.C. §1983.

115. Because of the actions of the SBE and Election Authorities, this plaintiff class has suffered direct and immediate violation of fundamental rights pursuant to FRCP Rules 57 and 65 to redress, remedy, and prevent future violations of their rights and the rights of others.

PRAYER FOR RELIEF

WHEREFORE, all plaintiffs ask for:

A. This cause to be expedited so that issue of whether the SBE may be restrained and enjoined for violation of plaintiffs' fundamental rights may be determined prior to the August 4, 2006 hearing before the SBE hearing examiner;

B. A declaration that the actions of the Defendants SBE and Election Authorities were and are unconstitutional, illegal, void and that the same were in contravention of the plaintiffs' constitutional rights;

C. That this action be certified as a class action under FRCP Rule 23 on behalf of each of the plaintiff classes;

D. That this action be certified with the Defendant class under FRCP Rule 23 because this class of Election Authorities failed to avoid the deprivations to plaintiffs caused by them and because they did not give the plaintiff petition signers notice and an opportunity to be heard in the defense of the validity of their signatures;

E. Each of the named plaintiffs to be designated for each of the plaintiffs' classes respectively, as class representatives, with Michael E. Lavelle and Kevin E. Bry of Lavelle & Motta, Ltd. as class counsel for each of the classes;

F. A declaration that certain provisions of the Illinois Election Code, specifically 10 ILCS 5/28-9 through 5/28-13, are unconstitutional because of their failure to comport with the fundamental rights of citizens and voters under the United States and Illinois Constitutions;

G. For preliminary and permanent restraints against the SBE, by injunctive orders, from not including all the signatures of the plaintiff classes in the count of the number of valid signatures on the petition for the purpose of restoring all signatures to the petition that were wrongfully removed and, for the purpose of the SBE making a final determination of the validity of the Statewide Advisory petition; and,

H. Grant all plaintiffs, including the three plaintiff classes, such other legal or equitable relief as this Court deems just and proper.

DATE: July 21, 2006

Respectfully submitted,

/s/ Michael E. Lavelle
One of Plaintiffs' attorneys

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x.....BIND HERE.....x

Election Jurisdiction
(leave blank)

PETITION FOR STATEWIDE ADVISORY QUESTION

We, the undersigned, registered and duly qualified voters of the State of Illinois, pursuant to Section 28-1 *et seq.* of the Illinois Election Code, do hereby PETITION that the following ADVISORY question of public policy be placed on the ballot and submitted to the voters of the State of Illinois at large, for their approval or disapproval, by referendum at the General Election to be held on the 7th day of November, 2006, to wit:

"Shall the Illinois General Assembly submit an amendment to Article IX of the Illinois State Constitution to the voters of the State of Illinois at large at the next General Election stating as follows:

'To secure and preserve the benefits of marriage for our society and for future generations of children, a marriage between a man and a woman is the only legal union that shall be valid or recognized in this State'?"

☐ **Yes**
☐ **No**

Signature	Print Name	Residence Address (House # and name of street or RR	City or Village	County	State
1.					IL
2.					IL
3.					IL

4.					IL
5.					IL
6.					IL
7.					IL

AFFIDAVIT OF CIRCULATOR

STATE OF ILLINOIS)
COUNTY OF _____) ss

I, _____, being first duly sworn, do hereby certify that I am 18 years of age or older and a citizen of the United States, and that I reside at _____, (Street Address) Street, in the _____ ("City" or "Village") of _____, (Name of City/Village) County of _____, State of Illinois, and that the signatures on the sheet were signed in my presence and are genuine, and that to the best of my knowledge and belief the persons so signing were at the time of signing the petition duly qualified and registered voters of the State of Illinois, and that their respective residences are correctly stated, as set forth above.

_____
(Signature of Circulator
Making this Affidavit)

Signed and sworn to or affirmed by _____(Name of Circulator) before me, this _____ day of _____, 200___.

_____
(Notary Public)

(SEAL OR STAMP) SHEET NO. _____ (leave blank)

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Springfield Toll-Free (877) 787-8011);
Chicagoland (630-790-9044

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Protect Marriage Illinois, Peter L. LaBarbera, David E. Smith, and Robert Pajor, Sheryl Amato and Cynthia Smith for themselves and on behalf of all others similarly situated,	
Plaintiffs,	
v.	
David D. Orr, Cook County Clerk; Langdon Neal, Theresa Petrone and Richard Cowen, Members of the Chicago Board of Election Commissioners; and Lance Gough, its Executive Director; Jesse Smart, Chairman, Wanda L. Rednour, Vice-Chairman, William M. McGuffage, Bryan A. Schneider, Albert Porter, Patrick Brady, Robert Walters and John R. Keith, Members of the Illinois State Board of Elections; and Daniel White, its Executive Director,	**No. 06 C 3835** **DECLARATION** **Honorable Elaine B. Bucklo** **Magistrate Judge Morton Denlow**
Defendants.	

DECLARATION OF DAVID E. SMITH STATEWIDE MARRIAGE PETITION PROJECT MANAGER FOR PROTECT MARRIAGE ILLINOIS

I, the undersigned David E. Smith hereby declare as follows:

1. I am a registered voter at 10435 S. Spaulding Avenue, Chicago, Illinois 60655 and a circulator and signer of the Statewide Petition that proposes the advisory question on the attached petition for presentation to the voters of Illinois (see Exhibit 1 attached);

2. I am employed by Protect Marriage Illinois as its project manager and was assigned the task of developing a plan to obtain sufficient signatures from the registered voters of Illinois to qualify the petition for presentation to the voters of Illinois on the November 2, 2006 general election ballot; this assignment was made by Peter LaBarbera, PMI Executive Director;

3. In this connection, I caused and/or conducted the following:

a. prepared instructions for the guidance of our petition circulators;

b. recruited the circulators for volunteer employment by PMI as petition circulators;

c. conducted training sessions for these employee-circulators;

d. headed up petition signing events at various gatherings of registered voters for collecting signatures;

e. received the completed petition sheets from the circulator and screened for errors by circulators;

f. when errors were encountered such as lack of an acknowledgement by a notary public, and/or a missing signature or circulator residence address, I would return the sheet to the circulator for correction;

g. affixed the election jurisdiction at the top of the petition sheet based on the jurisdiction identification by the employee-circulator or, if no jurisdiction identification provided, place the jurisdiction designation based on the jurisdiction applying to the residences of a majority of the signers on the sheet;

h. the after-the-circulation act of affixing the jurisdiction was planned by me due to my belief that the law required it to be done that way since I believed one could not indicate the jurisdiction until the signers signed the sheet, *i.e.*, if marked for a particular jurisdiction in advance. I thought it could be construed to be some kind of fraud since one could not be certain that only signers from that jurisdiction would sign that sheet;

i. in addition, when it was observed in the petition screening process that signers from more than one jurisdiction signed a petition, I would have a line drawn through the out-of-jurisdiction signature and address in the belief this is what the law required us to do; this procedure was followed until I learned as a result of a conversation with Michael E. Lavelle, our attorney, that such was not required by the law and the law was otherwise, *i.e.*, a line drawn through the signature did not delete the signer;

j. caused the numbering and assembly of the petition sheets for filing with the SBE with copies to each election authority; 347,912 signatures were

filed while a minimum of 283,111 signatures was required;

k. the timely filing of the petition sheets with the SBE on May 7, 2006; and, within 7 days thereafter, caused the filing of a copy of the petition sheets, bundled up for each election jurisdiction designated at the top of the sheets;

l. before filing, but after numbering, caused the petition sheets to be photocopied for our records;

m. during the petition campaign, additional employee-circulators were recruited to work for PMI, given instructions and copies of the petition and I both assigned them to specific events and caused them to circulate at locations of opportunity and to also help recruit additional circulators for us;

n. various and sundry other activities to promote the processing and filing of the petition sheets;

o. gave information to all whom I was able to connect with, including petition signers, concerning the merits of the question and why, in our view, the petition was needed;

5. In regard to my petition circulation activities, I organized groups of our circulators to attend, along with myself, at various locations, such as special events, churches, mosques, sports activities, state and county fairs, picnics, parades, auto racing meets, etc. and I also assigned others to attend at similar events throughout the state;

6. At these various events anywhere from 2 to 50 of our circulators would be assigned;

7. At events where our attendance was prearranged, any number of our circulators would be assigned, usually from 2 to 50 depending on the number in attendance, if 100 or less, usually 2 to 5 circulators and at larger events, where, *e.g.,* many thousand would be in attendance, I would organize as many as 50 to 75 circulators. For example, at the Illinois State Fair we had up to 75 circulators on more than one day;

8. At one church event, there were 9,000 in attendance. We had 50 circulators present;

9. At all prearranged events, such as at churches, the pastor would tell the congregation the merits of the petition question and ask them to sign the petition; in addition, he/she would also seek to recruit them as circulators; at these events, the circulator interaction with the signers was to respond to questions from the signer concerning the petition question;

10. Petition sheets would usually be identified for a jurisdiction with a post-it note;

11. At large events, there would usually be anywhere from 10 to 20 jurisdictions involved. Depending on the event, there would then be 10 to 20 clipboards per circulator or perhaps 2 or 3 jurisdiction sheets on one clipboard;

12. It was a delayed and awkward procedure but necessary to avoid signatures on wrong sheets. But even so, many signers in line left without signing saying they couldn't wait any longer;

13. On average, at least 10 voters were lost when as few as 100 were in attendance;

14. At the church with 9,000 members, we lost hundreds of members of the congregation, all of whom got in line but would not wait. Were we not required to limit the signers by jurisdiction, we could have had about 5 voters per circulator signing on as many clipboards. No delay would occur then and very few if any signers would have been lost.

15. At large public events, many more jurisdiction sheets were required, such as at major sports events like at U.S. Cellular Field where as many as 10 jurisdictions were involved, and at the state fair where about 75 jurisdictions would be involved on any given day.

16. At these events, we had to discuss the merits of the petition, get them to agree, then ask the jurisdiction and then search for it on the clipboards;

17. Again, people would leave rather than wait for us to find it. Also, we were unable to approach many other political signers because of the extra time necessary to search for the right jurisdiction;

18. In addition to what I personally observed, and from the reports I regularly received from our circulators, similar delays and lost signers was normal;

19. Based on my own observations and reports I received from our circulators I estimate, overall, that at least 10,000 potential petition signers were lost due to the delay. And, at least 2,000 hours of extra time was cumulatively wasted while searching for the correct jurisdiction petition sheet;

20. Circulation activities also took place during cold weather like on primary election day last March 21 when the weather was also below 30° throughout the state;

voters signing in the cold often provided a scribble signature particularly if they wore gloves;

21. Attached Exhibits 2, 3, 4 and 5 are documents which I received from the State Board of Elections; I hereby certify these to be true and correct copies of the documents they sent me;

22. If I were called upon to be a witness, I would so testify to the foregoing.

Further, declarant sayeth not.

/s/ David E. Smith
David E. Smith

VERIFICATION

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on July 27, 2006 /s/ David E. Smith
David E. Smith

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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Defendants.	

DECLARATION OF DIANE MARSH
EXAMINER OF QUESTIONED DOCUMENTS

I, the undersigned Diane Marsh hereby declare:

1. I am an examiner of questioned documents and a qualified expert as an examiner of questioned documents and including as a handwriting examiner; my qualifications and background are contained in my curriculum vitae attached hereto as Exhibit A;

2. I have offices at 1125 Alexandria Lane, Westchester, Illinois 60154;

3. I was retained by PMI to examine signatures to determine validity;

4. For each signature to be examined I was provided with a copy of a petition page containing a signature to be questioned. I was also provided with a certified copy of a voter registration card purporting to contain the official valid signature of the person signing the questioned signature;

5. I was requested to examine both signatures and to make a determination as to whether, in my opinion, both signatures were signed by the same hand;

6. In so doing, I was to give the reasons why I believed each signature was signed by the same hand or why I believed it was not;

7. I examined such petition signatures by comparing them to the known valid signatures and I determined 33 petition signatures, out of the 77 presented, sufficiently compared to the valid signatures for me to give my opinion that they were each signed by the same hand;

8. There are certain principals and theories of handwriting identification which I applied to each signature comparison I made before coming to an opinion. These principals and theories are provided on Exhibit B attached hereto;

9. I used 12 characteristics for analysis of the signatures at issue in making my determinations. These characteristics are shown on each worksheet; I noted on each worksheet which of the characteristics I examined for that signature. In addition, I noted comments with respect to certain findings as to some of the characteristics;

10. The worksheets then, are a record of the basis for my opinion. Attached as Exhibit C are three examples of my worksheet records together with the related petition signatures and the known valid signatures;

11. These worksheets also identify the name of the petition signer whose signature was being questioned. In addition, it contains the sheet number and line number of the petition on which the question signature was located. Also, it contains the voter registration number and the voter registration date found on the registration card.

12. If I were called upon to be a witness, I would so testify to the foregoing.

Further affiant sayeth not.

/s/ Diane Marsh
Diane Marsh

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on July 27, 2006 /s/ Diane Marsh
Diane Marsh